The Freedom of the Seas in History, Law and Politics

Pitman B. Potter

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The Freedom of the Seas
in
History, Law, and Politics

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By

PITMAN B. POTTER, PH.D.,

Associate Professor of Political Science, University of Wisconsin
Author of the "Introduction to the Study of International Organization."

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To

JESSIE DALTON POTTER

IN MEMORY OF THE YEARS

1914-1919

PREFACE

THE following work is the result of a study first begun in the Autumn of 1917 at Harvard University. The writer, as a candidate for the degree of Doctor of Philosophy at that institution, presented to the Faculty of Arts and Sciences, in the Spring of 1918, a thesis entitled *The Development of the Doctrine of the Freedom of the Seas, as an Aspect of International Maritime Jurisdiction.* The thesis consisted of an analysis of the works of Grotius and Selden on *The Freedom of the Seas* (*Mare Liberum*) and *Maritime Dominion* (*Mare Clausum*), respectively, an examination of the materials used by Grotius and Selden, and a study of subsequent development of the question, including a brief notice of the then current status of the problem and its possible future. The present work represents a complete rewriting of that thesis, some rearrangement of its parts, a reduction of the amount of attention given to historical materials, a considerable expansion of the legal materials used, and a great expansion of the amount of attention given to the political problems involved.

The subject itself is one of the two or three most vital and profound questions of international political and legal principle, being rivaled in interest and importance only by the question of the balance of power, with one aspect of which it is closely related. The United States has gone to war four times with the object of establishing on firmer foundations the freedom of the sea; the German

struggle for what she considered to be freedom of the seas, based on a close study of Mahan, was the chief cause of the war with Britain in 1914. The question has a long and dignified past, a rich body of materials for study, a highly controversial present, and a future intimately related to the great all-inclusive problem of international organization in general. It can therefore be commended to the attention of all readers and students of international history, law, and politics with greatest emphasis.

An attempt is made in the Introduction (Chapter 1) to indicate the methods of treatment which might be followed in such a study and the method actually adopted in the eleven chapters following. In Appendix A will be found an illustrative document of unusual interest and in Appendix B a list of works dealing with various aspects of the question of the freedom of the seas, with, finally, in Appendix C, a discussion of the value of that literature.

I am glad to have this opportunity to render thanks to Professor George Grafton Wilson, of Harvard University, under whom this study was begun, and who first led the writer into the field of international law and politics by his stimulating teaching and his keen analysis of international problems. I wish to express my appreciation of the fact that only by the enjoyment of one of the fellowships in International Law of the Carnegie Endowment for International Peace was I enabled to devote myself to this work. I am grateful to Professor William Herbert Page, of the Law School of University of Wisconsin for a reading of Chapters 6 and 7 in manuscript and to Dr. Herbert Francis Wright of the Division of International Law of the Carnegie Endowment for an examination of the manuscript of the bibliography. To all of the many students of this problem from ancient times to my own day upon whose thoughts I have drawn for information

and suggestion, I render thanks. And finally, I express my gratitude to my wife, Jessie Dalton Potter, to whom the volume is dedicated, and who has in many fruitful ways, direct and indirect, assisted in the making of this book.

Pitman B. Potter

University of Wisconsin

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The Freedom of the Seas
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THE FREEDOM OF THE SEAS

CHAPTER I

INTRODUCTORY: CONCEPT AND SCOPE OF TREATMENT

THE phrase "the freedom of the seas" means, and has always meant, many things to many men. One of the chief tasks of any student of the subject, therefore, is to explore and understand the various meanings which have been attributed to this formula from time to time by those who have employed it for one purpose or another. This, accordingly, will be one of the principal objects of what is said in the following pages.

We may, however, for practical purposes, adopt tentatively a meaning which will in the end prove to be the most precise and at the same time the most comprehensive of all possible definitions of the phrase, and likewise that definition least calculated to prejudice any conclusions to be drawn regarding the political and ethical aspects of the case. We shall start by assuming that, at any given time, the formula "the freedom of the seas" refers to that measure of liberty accorded by international law at that time to the nations or states recognized by international law, or to their subjects or citizens, in the use of the sea and its component parts. This assumes that international law is a body of general principles and detailed rules accepted by the states of the world as binding upon them in their relations with one another, that

it is formed by the accumulation of precedents from international practice, by the conclusion of explicit international agreements of various types, and the scientific elaboration of these materials by jurists and scholars, and that, normally, nations or states, as viewed by international law and recognized by one another as fellow members of the community of nations, are the possessors of the rights defined by international law, but that the rights of states under international law are enjoyed in part by them directly and in part through their subjects or citizens. It leaves for further definition the extent of the "liberty" accorded, and the scope of the idea of "the sea."

In describing the extent of the liberty accorded to states and their citizens at sea various lines of approach might be followed. The ethical aspect of the subject might be discussed; that is, an attempt might be made to decide upon the amount of liberty which ought to be accorded in maritime activities of various sorts. On the other hand, the strictly legal aspect of the matter might be kept in mind, and an attempt made to state the liberty actually accorded by international law, be that less or greater than what would be considered just in view of all circumstances. The question, again, whether treated in respect of law or of ethics, might be dealt with as of the present, the past, or the future, in any one of several combinations. Finally, the subject might be treated according to the judgment or opinions of the writer alone, or the writer might attempt merely to record the views of others.

Certain of these many aspects of the subject, and certain combinations of these aspects, have little to commend them to the average student and reader. Just what the law of the matter was, in all its details, in the seventeenth century, is of no great moment now. What various propagandists are saying to-day regarding the desirable

rule or principles to be adopted for the future must be heavily discounted to be of any value. It seems best, therefore, to carefully select certain angles of the subject alone for direct discussion, leaving other angles for merely incidental treatment.

It is, above all, desirable to have a statement of the law as it stands in our own time, defining maritime freedom as actually recognized by accepted international law. For reasons which are, in part, familiar to every student of international affairs, and which will be made clearer in the course of the discussion, it appears impossible to attain that desirable object exactly, and necessary, as a consequence, to content ourselves in the main with a statement of the law as it stood in 1914, before the outbreak of the World War,[1] leaving for further discussion the effect of the World War upon the law as it stood in 1914.[2] This statement of the law will be based chiefly upon authoritative works on international law, supplemented and modified by the writer's own conclusions from an observation of international practice and other primary evidences of the law of nations.

For a full understanding of the law as of 1914 and the effect of the World War on the law of 1914 a review of the history of the question prior to 1914, especially with reference to the controversial discussions of the extent of freedom at sea which ought to be accorded to individual nations, is desirable, and this may be regarded as second in importance only to the statement of the modern law.[3] This review of the discussion of the policies and ethics of the case by those who have taken part in the great debate in times past, will provide an opportunity for such

[1] Below, Chaps. 6–8.
[2] Below, Chap. 9.
[3] Below, Chaps. 2–5.

statements of the law as it stood in those periods as may be useful.

Finally, it will be desirable to canvas the various considerations of fact and policy which dictate this, that, or the other rule or principle for the present and future.[4] Such a survey will be based in part upon the views of others, but, in the nature of the case, will consist chiefly in a statement of the writer's own conclusions from a study of the problem.

The following pages, then, contain a history of the discussion of the problem of the freedom of the seas in ethics and law prior to 1914, a statement of the freedom of the seas as defined by international law in 1914, and a study of the various factual and political considerations which should govern the question to-day and for the future. International practice, in the sense in which that phrase is used to describe the concrete activities of the states in their relations with one another, will be dealt with only in so far as it has become, on one hand, material for reflection and theory on the part of former students of the problem, and, on the other, material used in the formulation of accepted international law.

There are certain additional facts which should be noted at this point because of the method of treatment which they impose.

In the first place, it will be useful to remember that we are dealing with a question very controversial in character, and one very likely to stimulate reactions in our sympathies, our feelings, and our national and international loyalties and animosities. In the past a great deal of the effort given to the study of this subject has been vitiated by the influence of such forces, and frequently

[4] Below, Chaps. 10–12.

the whole question has been made merely a field of verbal warfare where truth and justice have been lost from sight amid the conflicting passions let loose upon the scene. A deliberate effort must be made at certain points in the discussion to preserve an unbiased and scientific attitude.

Second, the materials available for such a study are so vast that two results follow immediately. On one hand, it would be impossible to collect and organize and set forth all such materials in any reasonable space of time and in any work of reasonable length. On the other hand, if this could be done, and were done, the result would be to blot out the essential conclusions regarding the freedom of the seas beneath an avalanche of details of practice and theory. For "the freedom of the seas" is a phrase of secondary or indirect import which refers for its final definition to a multitude of detailed rules regarding state jurisdiction over territorial waters, the capture of vessels in time of war, and many other matters. About one half of all the material of international law is involved sooner or later.

A further consequence of this situation is found in the fact that not all of the utterances and rules of law which deal with what we consider "the freedom of the seas" are worked out in practice or set forth by jurists with that idea in mind. Hence, they are not made in such a form as to be easily dealt with in a discussion of that subject. Much of the perplexity felt regarding this question in the ordinary discussions of the day arises from confusion as to the scope of the subject, and the consequent awkward treatment of some of its branches, on the part of speakers or writers who fail to see the whole problem and the true centre of the problem and adjust their utterances to it.

Such a study as this should be of interest at the present

time. International law, or, rather, the international law of war, and particularly the law of war at sea, was more or less unsettled by the World War. It is now proposed, in many quarters, to review the law as it stood in 1914, the practice of the years 1914–1918, and restate—perhaps codify—the laws of land and naval warfare for the present and future, making such changes in the old rules as seem necessary and desirable by reason of the events of 1914–1918 and modern standards of international relations.[5] Obviously, a study of the past, present, and future of the freedom of the seas should be helpful at this juncture.

It is very commonly realized, in a general sort of way, that the discussion of the freedom of the seas did not begin with Woodrow Wilson and the second of his Fourteen Points of 8 January, 1918.[6] But it is not commonly realized how far back in human history the discussion does extend. In one volume we find it stated that the phrase "was put forward by Germany" to cover her villainy at sea, actual and projected.[7] In another place it is said—still more inaccurately—that Colonel Edward M. House "was the originator of this much debated doctrine" and that "no previous mention of it has been found.[8] A much simpler and much more nearly satisfactory explanation will occur to those familiar with American diplomatic history, and it will at once be pointed out

[5] American Society of International Law, *Proceedings*, *1920:* 15, 21, 24, 79, 83, 85; *1921:* 1, 14, 96; *1922:* 37, 49–71; *1923:*— For explanation of abbreviated citation see, below, Appendix B.

[6] Scott, *President Wilson*, 359. "Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in part by international action."

[7] Davison, 33.

[8] Smith, *House*, 188.

that the controversy of 1914–1918 was simply a repetition, in large measure, of the great controversy between America on one side and England and France on the other, in the Napoleonic period, respecting American rights at sea.[9]

Actually a much more extended return to the past is possible and desirable. In his life of Pericles, the great Athenian statesman of the fifth century before Christ, the biographer Plutarch gives an account of the circumstances which led one Greek people, the Megareans, to join their neighbors the Corinthians, in 432 B. C., in what came to be the Peloponesian War. He says: "The Corinthians were joined by the Megareans, who brought their complaint that from every market place and from all the harbors over which the Athenians had control they were excluded and driven away contrary to the common law and the formal oaths of the Greeks." [10] Thucydides, writing at the same period, but describing the actions of Minos, king of Crete, about six hundred years earlier, or about one thousand years before the Christian era, relates that this monarch "made himself master of a great part of what is now termed the Hellenic Sea." [11] The problem was, therefore, an active issue in interstate relations, and recognized as such, in classical and even primitive Greek times.

At no time between 1000 B. C. and the present has the question entirely escaped from the attention of the publicists and officials of all sea-faring states. The high-water mark of this secular debate—and "debate" it has

[9] See Barton's *Freedom of Navigation*, published in Philadelphia in 1802, for example; also Moore, *Principles*, Chaps. 2 and 3.

[10] Plutarch, *Pericles*, XXIX, 4; for citations of Greek and Latin writers see, below, Appendix C, Notes on Documentation, § 1.

[11] Thucydides, I, 4.

been, for there has been a fairly well recognized division of the discussion into two opposing views—came in the first half of the seventeenth century. The attention devoted to the dialectical and scientific aspects of the question during the Napoleonic age and during the years since 1914 is inferior in both quantity and quality to that bestowed upon it between 1600 and 1650. It seems advisable, therefore, to take the "battle of books" of these years, as it has been called,[12] as the centre of our historical survey.

Such a step is made more useful by the way in which the controversy is summarized for us by two treatises which made their appearance in those years. In 1609 there appeared a rather brief work by the great Dutch jurist and publicist Hugo Grotius under the title *Mare Liberum*. As the title implies, Grotius pleaded for a free sea for all men and all nations. In 1635 there appeared a much larger work, composed by the English scholar and jurist John Selden, entitled *Mare Clausum*, in which Selden supported the case for a closed sea. Both men marshalled all available data at their command, and both were commanding scholars of their age. The first result was that all of the discussions and practices of earlier periods were gathered up into these two works. As a further result, the subsequent history of the debate appears to one familiar with those works as but a development in detail of the positions taken by Grotius and Selden in 1609 and 1635.

To the discussion prior to Grotius and Selden, to their controversy itself, and subsequent argumentation pro and con we now turn, as a prelude to a study of the law in 1914 and the possibilities for the future.

[12] Nys, *Études*, Vol. II, 260–272, and *Origines*, 379–387.

Part I

HISTORY OF THE DISCUSSION OF THE FREEDOM OF THE SEAS

CHAPTER II

THE DISCUSSION IN ANTIQUITY

During the ten centuries which were brought to a close by the collapse of Rome a certain amount of attention was from time to time devoted to the problem of maritime freedom as a recognized subject of interest and action. In addition, many things were said or done of significance to any student of the subject, although at the time these things were not always consciously said or done with the freedom of the seas in mind. Selden, writing in 1635, did not fail to gather together and record all such actions and utterances,[1] including many which could only by a great effort be made to carry any meaning in this connection.[2] Grotius was not far behind in this activity, although the supply of materials available to him is, in the nature of the case, more limited, as will more fully appear later.

The early peoples of the Levant, or some of them, apparently recognized the possibility of a dominion of the seas and gave that possibility some attention.[3] In general they were inclined to assume that it was quite possible to create and maintain a dominion over the sea comparable

[1] Selden, Bk. I, Chaps. 5, 6, 8–15. See, below, Appendix C, Notes on Documentation, § 2, regarding literature cited in Selden.

[2] Selden, Bk. I, Chap. 8.

[3] Selden, Bk. I, Chaps. 6, 10; Müller-Jochmus, *Anhang*, §§ 12, 26, 33, 41, and §§ 1, 2, 7, 10.

to that on land. In spite of the somewhat poetic tone of many of the records it is possible to perceive with a fair degree of clarity the attitude taken on this subject by the peoples of the Levant and the Middle East prior to, or apart from, the states of classic Greece and Rome.

Thus Antiochus IV, Epiphanes, King of Syria in 176 B. C., is quoted by an ancient writer as asking, in regard to the Syrian Sea, "are not both the sea and the land mine?" [4] The people of Tyre were said to have "brought the sea under their dominion for a long time, not only the neighboring sea, but wherever their fleets went," [5] so that the expression "a Tyrian sea" came to mean a body of water under control.[6] Xerxes is said to have declaimed at one time as he scourged the Hellespont in a fit of temper: "thy lord inflicts on thee this punishment." [7]

More precise than these rather general and poetic statements are other descriptions of the activities and policies of primitive Greek rulers. Thus, it is recorded that "there was an ancient ordinance concerning the Erythrean Sea laid down by King Erythras, when he was master of that sea, that forbade the Egyptians to enter it in a ship of war, and restricted them to one merchantman." [8] Herodotus tells us that "Polycrates (of Samos) entertained a design which no other Greek so far as we know ever formed before him—unless it were Minos the Cnossian and those (if there were any) who had the mastery of the Ægean at an earlier time—Polycrates . . . was the first

[4] Joseph Ben Gorion, Bk. III, Chap. 12, quoted in Selden, Bk. I, Chap. 12; Müller-Jochmus, 245.
[5] Quintus Curtius, IV, 20, 19.
[6] Festus, 484, phrase *Tyria maria.*
[7] Herodotus, VII, 35.
[8] Philostratus, III, 35.

of mere human birth who conceived the design of gaining the empire of the sea." [9]

The case of Minos is the most famous of all in this period. Thucydides says that Minos is the first to whom tradition ascribes a navy. "He made himself master of a great part of what is now termed the Hellenic Sea." [10] Diodorus Siculus writes that "he (Minos) was the first of the Greeks that rigged out a brave navy and gained the dominion of the sea." [11] Seneca has one of his characters salute Crete as "mistress of the vast sea." [12] And Aristotle explained how, by means largely of its geographical location, Crete, under Minos, "acquired the empire of the sea and the isles." [13] This maritime dominion of Minos has been dated back by some students of the problem as far as the fifteenth century before Christ.[14]

Eusebius, who took very extensive note of this whole question, does not, for some unknown reason, mention Minos. But he makes a list of seventeen other nations which had held the dominion of the sea in ancient times. Eusebius includes in his roster the Lydians,—who, a later writer avers, succeeded Minos in the tenure of maritime dominion,—the Pelasgians, the Thracians, Rhodians, Cyprians, Phoenicians, Egyptians, Milesians, Lesbians, and others. Eusebius himself is believed to be repeating the record of a lost historian before him. Many of his items are confirmed by Strabo, by Herodotus, and other extant historians. The information given by Eusebius is, of course, so meager that not much can be deduced from

[9] Herodotus, III, 122.
[10] Thucydides, I, 4.
[11] Diodorus Siculus, V, 18; see same, IV, 60; IV, 79; V, 54.
[12] Seneca, *Hippolyte*, I, 85; *Phaedra:* "O magna vasti Creta dominatrix freti."
[13] Aristotle, *Politics*, II, 10, 1.
[14] Phillipson, Vol. II, 372; Müller-Jochmus, 236.

it, and not only are the Samians and Polycrates omitted from the list, but also no mention is made of any individuals whatever.[15] But it amply attests the scientific recognition of the question of maritime dominion and indicates a tendency to admit the existence of such dominion.

It remains to decide upon the degree of importance, the significance, to be attached to these statements of the historians.

The most obvious suggestion,—assuming, of course, as we must assume, in the absence of means and opportunity to criticize the records as here given, that the facts are accurately related,—the most obvious suggestion is that these writers were imposing upon events and practices of an earlier time a concept arising in their own thought and in their own age, but not, perhaps, existing in the period of which they were speaking. In other words, did the rulers and peoples of the states of the Near East, the Levant, and primitive Greece, consciously conceive of their actions in terms of maritime dominion, or did they merely obtain and exercise what we should call maritime dominion, without themselves recognizing it as such? Beyond this comes the question whether such attempts to secure and maintain dominion were regarded by other peoples as proper, legitimate, legal, or not.

Müller-Jochmus, from his observations, concludes that there was, in the minds of the ancients, a legal idea (*Rechtsansicht*) of sea dominion. He asserts that practice was fairly uniform in different places and periods, that proprietorship (*Eigenthümserwerbung*) was regarded almost universally as possible, and that thence the idea

[15] Eusebius, No. 844 (Selden erroneously says No. 940; Selden, Bk. I, Chap. 10). Eusebius does include (No. 1150) the Cyprians, contrary to Selden's statement (Selden, same). See also Müller-Jochmus, 238.

of exclusive sovereignty (*Herrschaft*) over the sea, expressed in the Greek verb "to rule," [16] was developed, and that such power was recognized as a legal power (*eine rechtliche*). The list of Eusebius is taken as evidence of the recognition of a definite legal category (*Rechtsansicht*) and it is declared that the legal character (*Rechtsmässigkeit*) of Minos' dominion appears to be conceded by Greek writers.[17]

These apparently clear-cut views are subjected to some qualifications, however. Müller-Jochmus recognizes that in most cases the control exercised by a given ruler over a given body of water was mainly a *de facto* physical control (*eine faktische*), observed to exist in fact by other peoples and rulers, perhaps, but not recognized, as we should say, as a matter of legal right. Often the commander of the sea was really only a commander at sea,—an admiral, that is, in his country's navy. Or, the national dominion was, perhaps, only one of influence, prestige, or power. Minos' dominion of the sea is described in one place as merely factual (*thatsächlichen*).[18]

The attempt to establish a legal character for the maritime dominion obtained and exercised by these early Levantine peoples seems doomed to failure. The whole of the evidence is to be found in state practice, as above recorded. There is no evidence of a recognition of a legal concept of maritime dominion. Because there is no evidence of the recognition of a law of nations. Rulers knew that dominance at sea was desirable and possible; those who could obtain it did so. But the question, as a question of law and right, had not yet emerged, because the concept of interstate law itself had not emerged.

[16] κρατεῖν.
[17] Müller-Jochmus, 235–237, 240.
[18] Müller-Jochmus, 236.

This conclusion is confirmed when we notice the grounds on which dominion over the sea is based by contemporary students of the question. Aristotle mentions the geographical situation of Crete as the basis of her dominion at sea, and he does not mention that factor as entitling her to dominion as of right, but as enabling her to secure that dominion as a matter of practical success. The part played by his navy in Minos' success is stressed by several writers;[19] and the fact that Minos cleared the Ægean of pirates is given as evidence or definition of his position in that sea,[20] whereas at other and later times the clearing of a sea of pirates is often described as the establishment of the freedom of the sea. Evidently, the decisive fact was not what was done with regard to the use of the sea by a ruler in position to say what should or should not be done there, but the fact that he was in that position. It was not the exercise of recognized authority which was important so much as ability to exercise control in fact.

When we come to classic Greece, however, matters change somewhat, for we there encounter the great contest for ascendancy between Athens and Sparta, a contest which, in the very nature of the case, took place on sea as well as on land, and inevitably raised the question of political and legal rights and power at sea. First one state and then the other secured an hegemony which was applied to maritime as well as continental affairs, and which they claimed as legitimately due them, in view of all the circumstances.

The purposes of the contending parties in the Greek

[19] Diodorus Siculus, as cited, V, 84; "Minos, king of Crete, having a strong army and, with a powerful navy, master at sea, was . . ."

[20] Thucydides, I, 4.

wars of ascendancy and the part played in their policies by the sea are reflected in numerous utterances of Greek historians and statesmen. Demosthenes described to the Athenians—in the course of an argument on a collateral question—how certain generals had delivered Byzantium to their admiral, Thrasylabus, and thus made them "masters of the Hellespont" so that they were able with propriety to farm out the tolls on that strait and gain ample funds thereby.[21] Referring more generally to the Ægean at large, it is recorded by another historian that at one juncture the Spartans "desisted from long contention and yielded a preëminence of sea dominion to the Athenians." [22]

Themistocles and Pericles were the leaders in this policy and this demand on the part of Athens. Thucydides records that the former "first dared to say that they must make the sea their dominion." [23] Pericles at one time, in supporting his maritime program, reviewed at length the disadvantages under which Sparta was laboring, and concluded: "such I conceive to be the chances of success of the Lacedemonians, . . . such is the power which the empire of the sea gives (us)." [24]

Attaining a predominance upon the sea, the Athenians exercised their control with little restraint. They excluded the Megareans at one time from all ports over which they had control.[25] In the peace made with Sparta

[21] Demosthenes, *Against the Law of Leptines*, LX; the episode referred to by Demosthenes is told in Xenophon, *Affairs of Greece*, IV, 8.

[22] Aemilius Probus, quoted in Selden, Bk. I, Chap. 11, and in Müller-Jochmus, 244, n. 13 (*"imperii maritimi principatum concesserunt."*)

[23] Thucydides, I, 93.

[24] Thucydides, I, 143.

[25] Plutarch, *Pericles*, XXIX, 4.

in 423 B. C., they imposed upon the latter the regulation that neither Sparta nor any of her allies should sail along the coasts of Greece in war vessels or in any ships of over five hundred talents burden.[26] Henceforth they could fairly exercise the right of exclusion under the treaty agreement. And as against Asiatic states the same policy was pursued. In 478 B. C., "before the Athenians had obtained their empire of the sea," as Plutarch puts it,[27] the admiral Cimon was sent to drive the Persians onward in their flight from Greece, and in defense of the fatherland he succeeded in defeating the enemy in a naval battle at the mouth of the Eurymedon. He then and there stipulated that in the future the Persian "was not to sail west of the Cyanean and Chelidonian islands with any armored ships of war."[28]

The Spartans themselves were able at times to secure control "without difficulty," says Isocrates, whenever the Athenians slackened their efforts. He attributes this to the magnificent energy and discipline of Sparta, and describes the result at one juncture by saying that the Spartans "(now) gained command of the sea."[29] This called forth renewed efforts on the part of Athens, and when the latter had regained her position she watched with greater care for she "feared the Spartans might reëstablish their power at sea."[30] All of these turns of fortune were duly embodied in interstate treaties or international conventional law.

Again it becomes necessary to scrutinize the record in order to decide upon its exact meaning.

[26] Thucydides, IV, 118.
[27] Plutarch, *Cimon*, VI, 1.
[28] Plutarch, *Cimon*, XIII, 4.
[29] Isocrates, *On the Peace*, 102.
[30] Demosthenes, *Against the Law of Leptines*, XLII.

To Selden, of course, this record meant that the Greeks of the classic period practiced and recognized maritime dominion, and he therefore dwells on this particular body of data at great length.[31] More scientific students of the subject in modern times are inclined to support his conclusions. Phillipson declares that, in this period, "property in the sea (on the part of a state) was considered possible not merely in territorial (inshore) waters, but in regions extending far beyond those limits." He adds that "most of the leading states of antiquity claimed such sovereignty at one time or another," and that "Athens openly avowed a sovereignty of the sea" and was compelled at one time and another to fight both Sparta and Macedon for her title.[32] Müller-Jochmus, devoting more attention to this particular point, is equally convinced, and avers that, when a search is made for the way in which these ancients viewed the sea, "we hit upon the idea of the dominion of the sea at once." [33]

It does, indeed, at first glance appear that by the time of classic Greece there had developed such a body of thought regarding interstate relations as to permit us to say that the Greek city-states recognized maritime dominion as an established institution. It was this concept, as developed in this period, that, in part, influenced Plutarch, Herodotus, Thucydides, and others, to attribute maritime dominion proper to earlier rulers in Tyre, Crete, and elsewhere.

On the other hand, two things are clear by way of qualifications to this conclusion. The Greeks were concerned almost entirely with rather limited bodies of water along the coasts of the Greek peninsula, in the bays and

[31] Selden, Bk. I, Chap. 11.
[32] Phillipson, Vol. II, 376–377.
[33] Müller-Jochmus, 235–236.

harbors, and among the islands, of the Ægean Sea. This facilitated the establishment of maritime dominion and the conclusion, in theory, that it could be established. And, in the second place, the Greeks did not go very far in defining maritime dominion. They did not say whether it extended out over the open sea of the Mediterranean. They did not,—and here we encounter the greatest weakness of the Greek treatment of the problem,—explain definitely whether they meant a proprietorship *de jure* or a mere domination *de facto*.

Phillipson begins by asserting that "the maritime ascendancy of this or that conquering nation was not regarded merely from a comparative point of view, as to the predominance of interest (and power?), but was exercised rather in the sense of absolute proprietorship." He admits in the next breath, however, that the terms "rule the sea," "lord and master of the sea," "have command of the sea," are used with varying meanings. They occur frequently enough, but "they are seldom used in a sense of complete ownership. For the most part they designate temporary supremacy or predominating influence." [34]

In other words, while the Greeks of the classic period had gone further than the people before them and around them in recognizing maritime dominion, it is still impossible to say conclusively that they had recognized it as a legal right. The utterance attributed to the Megareans, and the treaties which are so often cited as having contained provisions for maritime control, while they clearly look toward the development of a body of international maritime law, do not suffice to justify the conclusion that *de jure* dominion of the sea was ad-

[34] Phillipson, Vol. II, 376.

mitted at this time.[35] There is a significant lack of evidence in the treaties concluded among the Greek city-states of any formal recognition of sea-dominion. Every sign—the nature of the state-system and the character of contemporary interstate practice—pointed to the imminent emergence of something of the kind, but as yet the possibilities of the situation remained latent and undeveloped.

Again in this case the grounds upon which the claims to sea control were rested confirm this inference. As Minos had gained dominion by clearing the sea of pirates in his day, so Cimon gained a dominant position by having intervened in Scyros and driven out the Dolopian pirates.[36] The problem of the pirate was ever present, and any commander who could clear the sea of these robbers would be sure to gain by that performance a regard in the eyes of the shipping population of the surrounding regions which would make him, in truth, lord of the sea.[37] And again this action received an ambiguous interpretation. Plutarch, describing Cimon's action, says he "made the Ægean a free sea." [38] Yet Phillipson points out that this very action led to arrangements by Athens "for policing the seas," [39] action which would merely substitute Athenian authority for piratical domination. The Greeks had not, in short, decided definitely what was maritime freedom and what was the opposite.

In point of fact, what was chiefly at stake was naval

[35] See materials in Scala, *Staatsverträge des Altertums*, 15 and following.

[36] Plutarch, *Cimon*, VIII, 5.

[37] The implication that piracy was a form of maritime liberty will be noted.

[38] Plutarch, *Cimon*, VIII, 5.

[39] Phillipson, Vol. II, 372.

supremacy. When Isocrates said that the Spartans "gained the supremacy by sea and land" he tells the whole story and tells it accurately.[40] The struggle between Athens and Sparta—maritime democracy against continental oligarchy—was primarily a struggle for physical ascendancy at sea and on land. The control exercised by Athens over Persia and Sparta in their maritime activities was the control rather of the mailed fist than that of legal right.[41] Thucydides tells how, at another time, "the Ionians fought with Cyrus and were for a time masters around their coasts";[42] mastery, not proprietorship, was at stake.

Other non-legal aspects of the situation are to be noted. Isocrates refers to the fact that Athens owns "more than two hundred ships" as one important aspect of her maritime power. The action of her navy in collecting contributions and seizing the strategic points of Byzantium and Chrysopolis, across the Bosphorus, where the Pontic trade could be held up, are described by Xenophon without any suggestion that her action possessed or created legal or constitutional authority.[43] Polybius dwells on the political value of the city: Byzantium so lies upon the Hellespont that no ship can enter or leave without its consent. And, as the Euxine holds so many things in demand by men, so the citizens of Byzantium are lords thereof, and the Greek states must necessarily keep peace with them or even secure them as allies.[44]

However ambiguous in its foundations may have been

[40] Isocrates, *Aereopagiticus*, 7.
[41] Müller-Jochmus, 24.
[42] Thucydides, I, 13.
[43] Xenophon, *Affairs of Greece*, I, 1, 22.
[44] Polybius, IV, 38.

the action of Athens in clearing the sea of pirates and policing the sea against their reappearance, her exercise of power at sea over other Greek states was not misunderstood as to its consequences. Her maritime domination was viewed as a tyranny incompatible with the liberty of Greece and the equality of the Greek states.[45] The control exercised over their trading ships, the confiscation of their war marine—these actions were regarded as parts of a system "which did not differ from tyranny either in its actions or the evils it entailed."[46] Isocrates, anticipating by two thousands years a certain nineteenth century critic of sea power, declared that, as soon as they obtained maritime power, Athens and Sparta in turn began to degenerate in their national ideals. Command of the sea bred haughtiness, pride, and corruption.[47]

Another face might be put on the Athenian policy by one sympathetic with the idea of sea power. As Phillipson has put it: "the Athenians did not exercise tyrannical power over the seas, . . . (they) were in favor of the freedom of the sea." They made every effort to prevent a noxious Spartan predominance at sea and to ensure the safety of peaceful commercial enterprise.[48] The prohibition laid upon the Spartans to prevent them from navigating in Greek waters with war vessels is noted in support of this conclusion. We have here, apparently, a case of one power securing naval domination and making the protection of the world's maritime liberty—and opposition to any potential rival—its own peculiar task. Athens ruled the waves in the interest of the freedom of

[45] Müller-Jochmus, 241, going upon Isocrates.
[46] Isocrates, *On the Peace*, 115.
[47] Same, 104, and *Areopagiticus*, 7.
[48] Phillipson, Vol. II, 377, 378.

the seas. Such an interpretation of sea-power is not unfamiliar to students of modern international relations.[49]

Of course, much of this view is merely an attempt at justifying national policy by imputing to it general social purposes or results. In one case, however, the Greek states appreciated the Athenian power at sea. Lycurgus relates how, after the battle of Eurymedon, the barbarians were excluded from Greek waters "for the protection of the liberty of Greece." [50] Like the freedom from piracy, Athenian command of the sea produced a certain degree of freedom for the Greeks from Persian naval expeditions. Athens became the maritime policeman for all of Greece, and that in large part by the acquiescence of the other Greek states.

At the end the Athenians seemed to plan just such a funding of their power and interests at sea with the powers and rights of other Greek states as has been contemplated by the modern mistress of the seas under similar circumstances. Pericles is recorded to have "introduced a bill to the effect that all Hellenes . . . resident in Europe and Asia . . . should be invited to send deputies to a conference at Athens . . . to deliberate . . . concerning the sea, that all might sail it fearlessly and keep the peace." [51] The freedom of the sea was a matter of general interest, and Athens was, as the dominant naval power, the natural leader in what was to be evidently a reorganization of maritime authority of great scope. Because of opposition from Sparta, however, nothing ever came of it.

[49] For interesting comparison of Athenian and British policies see Murray, G., *Our Great War and the Great War of the Ancient Greeks.*

[50] Lycurgus, *Against Leocrates*, 103.

[51] Plutarch, *Pericles*, XVII.

This is the conclusion of Greek practice and Greek thought regarding the sea. It dwelt predominantly upon maritime dominion, not maritime liberty, and conceived the latter only as a product of the former. It did not lay down any formal rules of legal right respecting sea dominion, but regarded the latter as, in the main, a matter of military and commercial power.

When we reach the age of Rome we find a still more conscious and articulate recognition of the problem of maritime freedom and dominion than in the period of classic Greece. The treatment accorded the question by Rome may be divided into two parts. There is, first, the theory and doctrine of the Roman law, as worked out by her great jurists and finally embodied in the *Corpus Juris Civilis* of Justinian. And, in the second place, there is a body of state practice not unlike that observed among the states of the eastern Mediterranean. To these we now turn in the order named.

At the beginning of the treatment of the law of things in the Institutes of Justinian we find this principle stated: "By the natural law some things are common to all, some public, some the property of a group, some of no one, but most things are the property of individuals." [52] Then follows the striking statement: "By the law of nature, then, the following things are common to all men: the air, flowing water, the sea, and, consequently, the shores of the sea." [53] The sea is said to be subject only to what is called the *jus gentium* and open thereby to free or public use.[54] The ownership of the sea belongs to no one, nor does the sand beneath it.[55] Rivers and ports like-

[52] *Institutes*, II, 1.
[53] *Institutes*, II, 1, 1.
[54] *Institutes*, II, 1, 1 and II, 1, 5.
[55] *Institutes*, II, 1, 5.

wise are public, fishing therein is common to all, and the fish of the sea are his who catches them.[56]

When we examine the Digest we find there substantially the same rules, with only a few modifications. The pebbles of the sea become the property of the finder.[57] Piling driven into the sea are his who places them there, provided that he does not interfere with the common use of the sea.[58] All this being true, title to the sea could not be acquired in any way, including in this prohibition prescriptive title by long possession.[59] Even the shores of the sea were open to common use, including the banks of the rivers; on this point the Digest and the Institutes are at one.[60]

The idea of the common, public, or free character of the sea as here described was the product of Stoic philosophy. In that philosophy the ideal of maritime freedom had its poetic expression comparable with that given to the ideal of maritime dominion in Greek times. Cicero described the principle of common use of the sea in these glowing words: "This, then, is the most comprehensive bond which unites together men as men and all to all; and under it the common right to all things that nature has produced for the common use of man is to be maintained, with the understanding that, while everything assigned as private property by the statutes and by civil law shall be so held as provided by those laws, everything else shall be regarded in the light indicated by the Greek proverb: 'Amongst friends all things in common.'" [61]

[56] *Institutes*, II, 1, 2; II, 1, 4; II, 1, 12.
[57] *Digest*, I, 8, 3.
[58] *Digest*, XLIII, 8, 3.
[59] *Digest*, XLI, 3, 45.
[60] *Institutes*, II, 1, 2; II, 1, 4; II, 1, 5; *Digest*, I, 8, 6.
[61] Cicero, *De Officiis*, I, 51.

The Roman philosophers and jurists thus raised what was at the time the first, and still remains in some ways the most powerful, challenge to the concept of maritime dominion put forward in human thought. The oft-quoted dictum of the Emperor Antoninus: "I am indeed lord of the world, but the law is lord of the sea," may be taken as a fine Roman statement of the principle of maritime freedom.[62]

When we turn to state practice in the Roman period, on the other hand, we find phenomena almost identical with those observed among the Greek states. Carthage, the Italian states preceding Rome, and Rome herself, all attempted to secure, and definitely claimed, maritime dominion as clearly as, if not more clearly than, had Athens and Crete in their day.

Polybius relates that "the Carthaginians enjoyed a command of the sea without any controversy, as received from their ancestors." [63] Elsewhere he refers to the same people as "enjoying a dominion of the sea without dispute." [64] At one time Carthage apparently declared a penalty of death for unlicensed trading from Spain, Gaul, and Italy to Sardinia, Corsica, Sicily and the Pillars of Hercules. This proud people exercised a powerful and reluctantly acknowledged authority in the western Mediterranean which lasted as long as Carthage herself.

On the Italian peninsula were many tribal states at the same time asserting similar claims. Strabo presents an account of how the people of Spineta—a city-state at the mouth of the Po—at one time "held a dominion over the sea." [65] In one passage Diodorus Siculus describes

[62] *Digest*, XIV, 2, 9.
[63] Polybius, I, 14.
[64] Polybius, III, 20.
[65] Strabo, V, 1, 7.

the colonizing plans of the Etruscans "when they were masters at sea." [66] Many other writers testify to the position held by these people. Livy wrote that "the strength of the Tuscans extended far and wide, on land and sea, before the Romans." [67] Diodorus, again, recounts that the Tyrrhenians "were formerly very valiant, and . . . , having a great navy, were long masters at sea." [68] And Strabo relates that Selene, one of their cities, was, in fact, "an arsenal worthy of a people holding dominion for so long a time over so vast a sea." [69]

Rome herself succeeded to the maritime power of these early peoples as Athens had succeeded to the power of Crete and the Samians in the East. Livy recounts a surrender of Hannibal to Scipio at which time the former expressed a hope that, if it pleased the gods, the Carthaginians, now yielding to Rome, might see their successors in turn ruling their dominions by land and sea.[70] True to the prediction, the Romans soon imposed restrictions upon the Carthaginians themselves in their use of the western Mediterranean, as Athens had once restricted Sparta in her maritime activities. By one of the settlements imposed by Rome upon Carthage in the course of their long struggle, the latter was compelled to surrender her whole navy and its equipment and supplies and to agree not to navigate northward toward Rome beyond a certain promontory.[71]

Later the Romans began to call the Mediterranean "our sea." Florus, writing at the beginning of the second

[66] Diodorus Siculus, V, 20; see also same, XI, 51.
[67] Livy, V, 33.
[68] Diodorus Siculus, V, 40.
[69] Strabo, V, 2, 5.
[70] Livy, XXX, 30, 26.
[71] Polybius, III, 22.

Christian century, referred to the Strait of Gibraltar as the place "where the threshold of our sea appears." [72] Sallust related how the veterans of the army of Hercules, —Medes, Persians, and Armenians,—when the army was broken up in that locality, were carried to Africa and "occupied regions adjacent to our sea." [73] Mela declared that "the whole of it (the Mediterranean), wherever it is found, is called by one term, *nostrum mare*." [74]

The most impressive episode in the Roman attitude toward the Mediterranean is to be found, probably, in Pompey's war against the pirates in 67 B. C. Cicero summarized the story in the course of his support of the Manilian law, which was designed to confer extraordinary jurisdiction upon Pompey for the war against Mithradates.[75] Cicero also remarked to his friend Atticus that Pompey's policy was clearly an imitation of that of Themistocles, for he apparently "believed that he who ruled the sea ruled the world." [76] Pliny also related that Pompey "freed the coasts from the pirates, and restored the sovereignty (*imperium*) of the sea to the Roman people"; [77] and Dio Cassius related that Pompey was, above all, "master of the entire sea," even when certain of his other advantages and resources had failed him.[78]

The most complete account of Pompey's activities is to be found in Plutarch. It deserves to be noted at length: "This power (of the pirates) extended . . . over the whole of our sea, making it . . . closed to all commerce.

[72] Florus, III, 6.
[73] Sallust, *Jugurthine War*, XVIII, 4.
[74] Mela, I, 1, 6.
[75] Cicero, *Pro Lege Manilia*, XI, XII.
[76] Cicero, *Letters, Attico*, X, 8.
[77] Pliny, VII, 26.
[78] Dio Cassius, XLII, 2.

This . . . inclined the Romans . . . to send out Pompey with a commission to take the sea away from the pirates. Gabinius drew up a law which gave him, not merely a command at sea, but an outright authority and irresponsible power over all men at sea. The law gave him dominion over the sea this side of the pillars of Hercules." There follow some details regarding the passage of the law, and the story concludes with a description of how Pompey divided up the sea and coasts into districts, cleared all of these districts of pirates, and set a commander with a squadron over each.[79]

Dionysius Halicarnassus carried this Roman policy and purpose to its logical conclusion by declaring that "Rome is ruler of the whole sea, not only that within the pillars of Hercules, but of the whole navigable ocean."[80] The Emperors in the East in the last days of the Empire called themselves lords of the sea both within and without the Hellespont, and lords of the sea and land in general,[81] and only by force could Rhodes and other maritime states compel the Emperors at Byzantium temporarily to refrain from charging tolls at the Straits.

What, now, shall be said of the value and significance of this evidence of Roman maritime dominion, and how reconcile the doctrine of the jurists with the practice of the Roman state?

In the first place, it is notable that Rome was dealing here not with local or limited bodies of water merely, such as the Ægean Sea or the coastal waters of Greece or Italy, but the whole Mediterranean, an inland sea in one sense, but the open sea as the Romans knew it. On the other hand, it is noticeable that the Roman policy and claim

[79] Plutarch, *Pompey*, XXV–XXVI.
[80] Dionysius Halicarnassus, I, 3.
[81] Selden, Bk. I, Chap. 14; Phillipson, Vol. II, 380.

was applied to the Mediterranean chiefly as it became a lake surrounded entirely by Roman territory, and not—except by extremists—to the Atlantic Ocean although the Romans were fully acquainted with the latter.

Even as applied solely to the Mediterranean, however, the state policy of Rome seems to conflict directly with the principles of the Institutes and the Digest, and, in view of the importance which has been attached to those principles in the history of the controversy over the freedom of the seas, it will be necessary to examine the matter with some care.

Müller-Jochmus puts matters on a chronological basis: the view expressed in the Roman law was an early view, which gave way to a later view where Rome considered the sea as an integral part of her territorial domain, the primitive natural law being overpowered by the sophisticated positive law. The change came, supposedly, with the change in Rome's position in the world and the growth and exercise of her sea-power.[82]

There is some basis for the contention that restrictions of maritime liberty came into the law by alterations based on empirical data of the more practical sort. Local custom contrasted with the general principles of the law in many cases, prescriptive rights encroached upon common rights based on general principles, and riparian rights multiplied rapidly and increased greatly in importance in the later Empire. But all of these limitations or exceptions were taken into account by Justinian. The Institutes and the Digest embody the law at its conclusion, and the principles of freedom of use and common enjoyment are found there in all their force. The attempt to explain the divergence between Roman law and Roman

[82] Müller-Jochmus, 252.

practice on this basis is therefore bound to be unsuccessful.

The explanation is much simpler. The rules in the Institutes and in the Digest refer merely to the free use, common use, public use, of the sea by all members of the Roman state. They relate to the rights of individuals toward one another in a single national society. They are not rules of interstate or international law at all. Antoninus spoke not of a law of nations but of Roman public law alone. This appears to be evident on the surface, but, if any further proof were needed, the use of the term "public," which meant common to all Roman citizens, would be conclusive. The limitation upon individual use, under the general right of public enjoyment, in the interests of preserving that public enjoyment, is further evidence to the same conclusion.[83] Likewise, the shores, which fell under the principle of public use, were specifically declared to belong "to the Roman people." [84]

Granting, then, that the law of the Institutes and Digest does not itself disprove the existence of Roman maritime dominion as against other states—and perhaps even reënforces it by implying a Roman state dominion in the sea for the enjoyment of all Roman citizens—can the theory of that law be recast or transposed to apply in the international sphere? Apart from the scientific risk attendant upon such a procedure in the abstract, it is to be noted—and this will appear clearly when we come to the use made by later scholars of these rules and principles—that ordinarily this task has not been frankly attempted by those employing the Roman law in discussing maritime freedom. They have simply put forward the

[83] *Institutes,* II, 1, 2, "public . . . common to all men"; *Digest,* XLI, 1, 50 and XLIII, 12, 1.
[84] *Digest,* XLIII, 8, 3.

rules of Roman law as though they automatically applied to interstate relations as well as to private relations. Did Rome so interpret the matter? Did Rome, in her theory of interstate relations, apply the ideas of the private law to her relations to other states, and did those states insist on this treatment, or did they yield recognition to Roman dominion? In other words, what, if any, were the holdings of contemporary international law on the point at issue, and how did it deal with Roman state practice as already reviewed?

Again in this period, as in the period of Athenian supremacy, the condition of international law presents a bar to the sure conclusion that Rome possessed a maritime dominion recognized by a law of nations. Now more than ever before was a true international law impossible. Rome had swallowed up the independent states of the Mediterranean basin. She claimed a maritime dominion, took control by her naval power, and exercised it freely and fully. But not with the free consent of free states. As a result of her conquests her sea dominion became a matter of imperial constitutional law and practice. As in Greek times, so here, we find practically no recognition of Roman maritime dominion among the many treaties concluded by Rome with other powers.[85] Rome held more physical power over the sea than any state in antiquity; less than in the days of Pericles, however, could it be said that there existed a freely recognized maritime dominion under freely accepted international law.

It will have been noted, also, that, as in the case of Athens, much of the Roman claim to maritime dominion rested upon her activities against the pirates. In this matter also Rome has less claim to maritime powers *de*

[85] See the materials in Täubler, 14–98, 188–317.

jure, at least in the period of the Empire, than had Athens. Piracy was, indeed, nothing more or less than interstate war in the early days. Piracy was an official state activity, and its suppression a matter of interstate war. Treaties were made limiting its practice, alliances were made to combat the pirate states.[86] Accordingly, success in that direction might naturally produce maritime dominion between state and state. But by the time of Pompey the independence of the pirate states had been destroyed, and hence piracy was merely rebellion or depredation not clothed even with the character of interstate war. Hence, further, its suppression could not lead to rights of sea dominion among independent states. The pirates were now merely rebellious Roman subjects or enemies of all mankind as embodied in one great state.

Finally, the poetical exaggeration traceable in the descriptions of Roman sea dominion are greater than in the time of Pericles. Rome and Roman power and majesty inspired poetic tributes to a degree not known to Athens. To read that the Emperor ruled sea and land, that Cæsar had made the British sea his own, that Augustus was god of the sea, and that Theodosius brought the sea under his scepter, is to appreciate chiefly the imaginative character of these poetic outbursts.[87] Roman maritime dominion was at once more powerful, less legalistic, and more romantic than that of Athens.

In sum, it cannot be said that either Athens or Rome held a maritime dominion recognized by a law among independent states as legally valid, in spite of their naval supremacy, their success in suppressing piracy, and the ideas and feelings of historians and poets regarding their

[86] Phillipson, Vol. II, 64–65, 70–71, 373.
[87] Virgil, *Aeneid,* I, 236–237; *Georgics,* I, 34.

position in general. The freedom of the seas was a great problem of interstate politics and diplomacy in this age, but not one which had yet become a matter of formal international law.

CHAPTER III

THE DISCUSSION IN THE MIDDLE AGES

During the long stretch of years from the decline of Roman power to the dawn of modern international relations the problem of the freedom of the seas emerged from the informal condition in which it had rested during antiquity and became a recognized legal issue among the nations. The activities of the maritime states of Europe continued to be dictated in large measure by considerations of relative power and desirable freedom at sea, and consequently the newly developing science of international law turned its attention toward a solution of the issue which had been joined, albeit tentatively and informally, by Megarea and Athens some centuries before. These currents of state practice and scientific discussion converged in the great debate of the early half of the seventeenth century.

For a period of some eleven centuries, from the fall of Rome to the seventeenth century, most of the evidence upon contemporary doctrine must be drawn from the implications of state practice at the time. As in Greek and Roman times, so during the long ages from 500 to 1600 A. D., not what was said, but what was done provides us with our best information concerning the theories and principles of that era.

With the breaking of Roman power, the Mediterranean states which had exercised maritime dominion in previous years regained control over certain maritime areas near their territories. Pisa and Tuscany once more controlled

the Tyrrhenian Sea, and imposed tolls upon those entering its waters.[1] The Genoese did likewise in the Ligurian Gulf.[2] Venice—somewhat later—acquired a dominion of the Adriatic which was variously described by contemporary writers, as a "seignory," [3] a "royalty," [4] an "empire," [5] and so on. It was said that they possessed "as full a jurisdiction in the sea as in the city," [6] that the neighboring gulf "belonged" to them.[7] In various terms their lordship was described by many commentators,[8] and Venice became a second Athens in her day, her maritime authority being admitted at one time or another even by Spain and the Empire.[9]

The Papacy, while not securing naval control of maritime areas in exactly the same way, did, nevertheless, put forward claims to jurisdiction over the coastal waters of Latium. The Pope pretended to excommunicate "all pirates passing through our sea (*mare nostrum*)." [10] The neighboring waters came to be referred to as "the Church's sea (*mare ecclesiae*)." [11]

It remained for Spain and Portugal to claim not merely the dominion of the western Mediterranean, in succession to Rome, but, carrying out the most extreme pretensions

1 Bonius, Art. 16, § 40, quoted in Selden, Bk. I, Chap. 16; also Nau, § 88. See, below, Appendix C, Notes on Documentation § 2, on literature of medieval civil law.

2 Nau, as cited.

3 Ubaldis, Consil. 290, quoted in Selden, as cited.

4 Cepola, Chap. 26, § 10, in same.

5 Same.

6 Same.

7 Tuschus, § 25, in same.

8 Nau, § 87; Daru, Vol. V, in general.

9 Molloy, Vol. I, Chap. 5; Schomberg, 48; Ogilvie, 62.

10 Bull, *Coenae Dominii*, quoted in Selden, Bk. I, Chap. 16, as commented upon by Cherubinus, Vol. III, 251.

11 Ugolinus, Part II, Chap. 3, § 1, quoted in Selden, Bk. I, Chap. 16.

of Rome, to claim dominion in the open Atlantic, north and south, and around into the Indian Ocean and the Pacific. The kings of Spain included the phrase *del mar Oceano* (of the ocean) in the list of regions subject to their rule.[12] The kings of Portugal put forward a claim to control the "navigation of (to?)" African and Asiatic regions rich in colonial trade.[13] Not only were unlicensed traders—alien or native—excluded from landing and trading in the regions of Ethiopia, Guinea, Arabia, Persia, and India so controlled by the Portuguese, but from sailing in the adjacent seas.[14]

The states of northern Europe likewise entered this race for maritime dominion. The French kings claimed to be supreme lords of all the seas which touched their coasts.[15] The Danes claimed dominion in the Baltic—a claim never extinguished explicitly in principle to this day.[16] Polish sovereignty of the sea was a matter of solicitude to her French allies,[17] and both Danish and Polish pretensions were matters of great concern to the intervening Hanse towns.[18]

Culminating in the British claims to sea dominion, this long and extensive body of state practice found here its most vigorous expression. A document of Alfred extended the King's power to the middle of the surrounding seas,[19] and Edgar styled himself "king . . . of the ocean

[12] Selden, Bk. I, Chap. 17, quoting from Imperial constitutions.
[13] Valdesius, Chap. 12, quoted in Selden, Bk. I, Chap. 17.
[14] Extract from the Portuguese *Ordonnances*, Tit. 112, in same, and see extract from Portuguese ordinance in Ortolan, Vol. I, 121.
[15] Caeronoeus, Bk. XX, tit. 7, consts. 1 and 28, in same, Chap. 18.
[16] Grammaticus, Bk. VII, in same, Chap. 19.
[17] Januszowski, Bk. III, tits. 1, 109, in same.
[18] Nau, § 82.
[19] Selden, Bk. II, Chap. 12.

lying round about Britain." [20] After the Conquest this claim was maintained and considerably extended. John required (1200) the striking of sails to all British ships at sea.[21] Edward I (1272–1307) instructed his naval officers to maintain firmly "the sovereignty which his ancestors the kings of England were wont to have in the sea so far as concerns the amendment, declaration, and interpretation of the laws by them made to govern all manner of nations passing through the said sea." [22] Henry IV (1399–1413) granted leave to a certain Spaniard to sail "freely from the port of London through our dominions to the town of Rochelle," [23] and Elizabeth (1588–1603) was besought by the king of Sweden to grant permission to one Wormaeus to sail to Spain "through the sea-dominions of the Queen," as the king wrote.[24]

In *Regina v. Constable* it was held that "the Queen hath the whole jurisdiction of the sea between England and France." [25]

[20] Malmesbury, Bk. II, Chap. 8, in Selden, Bk. II, Chap. 12.

[21] Twiss, Vol. II, 129.

[22] Tower, MS., quoted in Selden, Bk. II, Chap. 20; see also document of Edward in Coke, *Institutes*, Chaps. 22 and 44, holding that the King of England is in possession of the sovereignty of the sea of England, and that "within the four seas" means within English jurisdiction.

[23] *Rot. Franc.*, 5 Hy. 4, quoted in same; the same king later gave a permit to French ambassadors to pass "through all places under our power, our territories, our seignories, by sea and land" (same).

[24] Selden, Bk. II, Chap. 20, quoting from MS. letter in the library of Thomas Cotton.

[25] Leonard, *Reports*, Vol. III, 72. Such writers as Meadows and Buroughs and Clavel affirmed English rights to exclude "all foreign ships of war from passing upon any of the seas of England without special license for that purpose first obtained," and that the sovereignty of the British seas was the most precious jewell in His Majesty's crown, and that "the King of Great

Much more evidence of the same type might be exhibited here. Admirals' commissions were based on the proposition that the British kings were "lords of the English sea on every side." [26] Parliamentary records contain similar allusion to the "sovereigns of the sea," "lords of the sea," and so on.[27] Charles I, in levying ship money in 1634 declared that the British kings had ever been lords of the English sea, and this confirmed his current actions.[28] In the *Ship Money Case* (*Rex v. Hampden*) it was held that the King was sovereign of the sea and that therefore his subjects were bound to fight and be taxed to defend that sovereignty.[29] In a famous charge Sir Leoline Jenkins, sitting in admiralty at the Old Bailey, described "the sovereignty of our King in the British ocean," and asserted British power in the Four Seas, "to keep the public peace on these seas," "to maintain the freedom and security of navigation the world over so that not the utmost bound of the Atlantic Ocean nor any corner of the Mediterranean nor any part of the South or other seas but that if the peace of God and the King be violated upon any of his subjects or upon his allies or their subjects, and the offender be afterwards brought up or laid hold of in any of his Majesty's ports, such breach of the peace is to be inquired of and tried in virtue

Britain is Lord of the sea flowing about, as an inseparable propriety and perpetual appendant of the British Empire." Meadows, 7; Buroughs, 56; Clavel, 1.

[26] Commission quoted in Selden, Bk. II, Chap. 23, from *Rot. Scot.*, 10 Edw, 3. Further on exercise of the right of vail, and capture for failure to observe same, see Raleigh, Vol. VIII, 327; Ogilvie, 77–79.

[27] Quotations from *Rot. Parl.*, 46 Edw. 3 and 8 Hy. 5, in same.

[28] Proclamation of 20 October, 1634, quoted in same; for various documents illustrative of the British claims in the early seventeenth century see Fulton, 749–774.

[29] 1637; Broom, 303–367.

of a commission of oyer and terminer, as this is, in such country, liberty, or place, as His Majesty shall please to direct; so long an arm has God by the laws given to his viceregent the King." [30]

It will be observed that there are two elements present here. There is a great body of state practice, and there is some considerable comment upon it by observers.

The activities of maritime states as just reviewed were quite clear and definite in intention. Attempts were being made to secure control over various bodies of water for the sake of the practical advantages to be gained thereby. But in addition to this we observe a new tendency, a tendency to specifically claim, as a matter of right, the dominion sought by force of arms, a thing not so clearly observable in past times. The appearance of proud and pretentious personal rulers and of pushing mercantile states led to the assertion of claims sometimes exorbitant, sometimes unsupported, but always unabashed and frank.

The implication is that such claims could, as a general matter, be made and vindicated whenever the appropriate circumstances justified such action. In other words, it is implied that an institution of national maritime dominion was recognized and accepted as part of the principles of interstate relations or even international law and custom.

The language of the historians and private scholars seems to bear out this implication. "Princes have a right to impose tolls," says one writer.[31] Feudal legal terms—seignory, royalty, and so on—were commonly employed

[30] Quoted in *Queen v. Keyn*, 1876, L. R. 2 Exch. Div., 63; also in Wynne, *Life*, Vol. I, xc–xcv.

[31] Bonius, Art. 16, § 40, quoted in Selden, Bk. I, Chap. 16; see Nau, § 88.

to describe the situation.[32] There is common talk of the "empire of the sea (*imperium maris*)" [33] and "sea kings (*maritimos reges*)." [34] The language and the thought of these writers is substantially a duplication of that of the Greek historians in their day, with added emphasis upon the element of right and legal authority.

Things had begun to go further than this. As early as the thirteenth century a suggestion of a public law of interstate relations had appeared in writings of the civilians.[35] Beginning with the Civil Law, and devoting attention chiefly to the rules of war, various jurists now began to deal in legalistic terms with contemporary international practice.[36] In the thirteenth century we encounter an arbitration before the Bishop of Nervosia, referred to him by Gregory X for settlement, wherein question was made by the people of Ancona of the authority of the Venetians over the Adriatic, and wherein was rendered an award favorable to the latter.[37] Finally, a sixteenth century commentator describes the king of France as "supreme lord of the seas which are spread around his realm, in view of the fact that the right to these universals which were common by natural law or the law of nations has passed into his power." [38]

[32] Blondus, Bk. II, Decad. 8, and Peregrinus, Bk. I, par. 18, and Bk. VIII, par. 43, quoted in same; Nau, § 87, citing Sarpi, Mattheacius, and Frangipane.

[33] Selden, Bk. I, Chaps. 16–19.

[34] King Olo of Denmark is said to have vanquished some seventy sea kings in his time; Grammaticus, as cited.

[35] So in Accursius (1250); Bartolus (1350); Baldus de Ubaldis (1400). For titles see Appendix B, below.

[36] Bonet (1383); Victoria (1532); Oldendorp (1539); Covarruvias (1570); Vasquez (1572); Ayala (1582); Gentilis (1588).

[37] Selden, Bk. I, Chap. 16; Borroughs, 28; Justice, Chap. 1.

[38] C. Caronaeus, Bk. XX, tit. 7, consts. 1 and 28, quoted in Selden, as cited.

Many of the early treatises on the law of nations proper contained no references to the question of maritime freedom. Indeed, a large number of these works confined their attention entirely to war on land, to the privileges of ambassadors, and the law of treaties.[39]

Other jurists, while dealing with maritime matters to some extent, approach the problem entirely from the point of view of a specific case, either supporting or denying the claim of Venice or Denmark, in the Adriatic or Baltic, on specific grounds, without reference to the problem in general terms and with all the distorted emphasis and lack of perspective of the propagandist,[40] who cares nothing for legal science as such.

Finally, a few jurists began to see the nature of the general legal problem involved, and to argue the case, pro and con, in more or less general terms.[41] Thus Nicholas Everard, in the early sixteenth century, in a trial between a citizen of Ziericzee and the receiver of taxes of the Count of Holland and Zeland, contended for freedom of navigation in seas and rivers, arguing against navigation or entry taxes except in rare cases where Papal authority, or license from the Emperor or the king of the Romans or the authority of a eucumenical council or an ancient custom could be cited, and claiming that freedom could be gained against even such rights by prescription.[42] Alphonse de Castro suggested that the Venetian and Genoese claims to a right to prevent other peoples from navigating in the Adriatic and Ligurian seas, based on prescription, was open to suspicion, seeing that

[39] So Bonet, Victoria, Oldendorp, Hemming, and Ayala.

[40] So Caepola, De Curris, and Fulgosius. For titles see Appendix B, below.

[41] So Zoarius, *De Usu Maris*, 1593.

[42] Nys, *Origines*, 381.

the civil laws, natural justice, and the original law of nations forbade such action.[43]

The jurists of the natural law were very much concerned with the question of dominion in general. They dealt with the bases and scope of Papal and Imperial power in Europe at large. But they scarcely ever mentioned the sea. At the most natural points of treatment their writings simply omit all mention of maritime dominion.[44]

It is necessary, however, to recognize from this time on a regular allignment of authorities and evidence on one side and the other of the principal issue: whether it is possible, by the law of nations, to acquire a dominion over the sea; and whether such a dominion may be exercised to exclude persons from the use of the sea, to charge tolls therefor, and so on.

State practice, we have seen, all tended to indicate an affirmative answer to this question. Likewise, the newly developing bodies of national law tended to produce the same result. The traditional rules of the Roman law providing for public use of the sea and shores were repeated as the Civil Law was worked out in Spain and France and elsewhere, but they did not prevent the assertion of claims on the part of the Crown to control the sea and to grant to individuals exclusive privileges therein. Indeed, the public use of the sea and shores came to be placed mainly on the basis of a national title thereto,

[43] Same, 382.

[44] Soto, *De Justitia et Jure*, 1550, does not even mention the sea in Bk. IV in discussing whether the emperor is "lord of the whole earth" (*quaestiones* 1–4). So Victoria, *De Indis*, 1557, and Lessius, *De Justitia*, 1605, Bk. II, Chap. 3, dub. 1, dub. 11, and Chaps. 4 and 5.

subject only to special grants or special claims open to all men in like circumstances.[45]

In England this situation became very involved. Bracton (1260) repeated the principle that the sea is "common" by natural law, as stated in the Institutes, and set forth the rights of public building and fishing on shores and in seas and harbors and rivers. Then, quite without any apparent feeling of contradiction, he declares the king's right to levy tolls on fishermen in the public waters, treats of pourprestures made upon the sea and of the four seas around England as parts of the realm.[46] The Fleta followed Bracton.[47] The net result was a clear claim to some degree of national territorial jurisdiction over the sea.[48]

The establishment of admiralty jurisdiction in England is a subject all by itself but it sheds much light upon the view of the English law regarding the freedom of the sea at the time.[49] Ever since the thirteenth century Britain had been troubled by claims of French and Flemish victims of British sea-robbers or pirates.[50] Failing to settle matters satisfactorily by negotiation, and feeling compelled to conciliate Flemish commercial opinion, the British Crown decided, in the middle of the fourteenth

[45] Documents quoted in Selden, Bk. I, Chap. 17.

[46] Bracton, I, 12, 5, 6; II, 24, 2 and 5; III, 1, 3; III, 2, 1 and 116 and 118; V, 30.

[47] *Fleta*, I, 20, 18; III, 1, 4.

[48] See also Dooms of Ipswich (13th century) on the "iiij sees of Ingleland" as part of the realm for certain purposes; Belknap (1390) and Littleton (1475) followed the same doctrine. Twiss, Vol. II, 45. So Rolle (1668), Vol. I, 170, ¶ 18, following Selden.

[49] In general: Marsden, *Pleas*, Vol. I, Introduction, xiv.

[50] And by claims of Venetian and Genoese merchants to the same effect; Britain also had claims against Flemish and Breton pirates: Marsden, *Pleas*, Vol. I, Introduction, xxxv.

century (1340–1357) to establish certain special courts to deal with cases of piracy.[51] Heretofore prize matters had been dealt with by the courts of common law.[52] Edward III (1327–1377) now claimed again a special guardianship or jurisdiction over the sea, and since, after the battle of Sluys (1340), he was in point of physical fact master of the channel, he was able to vindicate his claim. The new courts of admiralty were to maintain "peace and justice among the people passing through the sea of England." [53]

To a large extent, of course, we have here merely a national pretension, not by itself conclusive upon the point whether maritime dominion was legally possible for any one and whether the British had secured such a dominion. And for the acquiescence of other states, the evidence is not uniform. There is an old recognition of British maritime sovereignty by a Congress of the Empire in 1299.[54] And another in the time of Edward I.[55] Edward II (1307–1327) had, apparently, secured in 1320 an admission from certain Flemish negotiators that he was "lord of the sea" and that a certain robbery "was committed on the sea within his power." [56] But this was not universal, and both the French and Spanish protested against the idea of British maritime dominion put forward by Ed-

[51] Marsden, as cited, xiv, xxxviii; Twiss, as cited, Vol. I, 29, n. 3.

[52] Holdsworthy, Vol. I, 304–313.

[53] Selden, Bk. II, Chap. 24; Marsden, Vol. I, xv. The Admiralty office had dealt heretofore only with naval administration and discipline.

[54] Vattel, Vol. I, Chap. 23, § 289, citing Selden, Bk. II, Chap. 28.

[55] Molloy, Vol. I, Chap. 5.

[56] Marsden, as cited, xxii, xxxiii, xxxiv. Edward I had defended his claim to maritime sovereignty against the Flemings in 1297; Marsden, xxxiv.

ward III,[57] so that in the end the jurisdiction was founded on personal grounds, through the captors of the vessel in question.

The British interest in the question of sea dominion soon became involved with the question of maritime warfare proper.[58] The Admiral was given instructions not only to visit and search vessels in time of peace in British waters in order better to suppress piracy in those waters. He was also given authority to visit and search friendly vessels in time of war in order to discover enemy property on board.[59] To this activity also there was considerable resistance,[60] but by the sixteenth century such procedure was pretty generally recognized. In spite of continued objections the Tudors continued to instruct the Admiral to seize any vessels resisting visit and search in British waters.[61]

Beginning on the basis of claims to territorial jurisdiction over the sea, the right of visit and search gradually became involved with the entire law of naval war and the newly developing ideas of neutrality. The concept of neutrality was practically unknown in antiquity; it was only vaguely realized in the thirteenth century;[62] not until the end of the sixteenth century did the idea emerge

[57] Marsden, lxv, lxix.

[58] For an early reference see, below, Appendix A, in the *Libell of Englishe Policye*, at note 7.

[59] Twiss, Vol. I, 29; Hautefeuille, *Histoire*, 124, following Pardessus, *Collection*, Vol. II, 322, dates the origin of visit and search back to the middle ages proper.

[60] Robinson, 35.

[61] Same, 127; Rymer, Vol. XIII, 329; on origin of visit and search see Atherley-Jones, Chap. 5.

[62] As regards trading with the enemy of one's friends; Pardessus, *Us*, Vol. II, 303, n. 4, Commenting on Chap. 276 of the *Consolato del Mare*.

in anything like clear form.[63] Now, with the decay of Imperial and Papal power and the crystallization of independent state policies of expediency and advantage, a great impetus was given to the theory in all quarters. The Mediterranean trading cities and the Hanse towns fought strenuously for a right to trade with both belligerents and, in a fashion, made good their demands.[64]

Contraband trade, or the idea of contraband goods was likewise more clearly recognized. As far back as the thirteenth century Louis IX, Phillip the Fair, and Boniface VIII had forbidden trade in arms with the infidel.[65] Edward I (1272–1307) and his successor Edward II (1307–1327) attempted to prevent the Flemings from providing his Scotch and French enemies with supplies in time of war, following the example of the Venetians and Genoese in removing contraband persons and goods from friendly vessels trading with the enemy.[66] Finally, after a century of only partially successful efforts to define the idea of contraband of war,[67] the carriage of provisions by Baltic merchants to Spain and by French merchants to Portugal was held illegal.[68]

[63] Dumont, Vol. IV (1), 378 and Vol. IV (2), 137. Elizabeth protested to Mary, Queen of Scotland, in 1562, against the capture of English vessels in Danish waters; Marsden, *Law and Custom*, Vol. I, 172, 180.

[64] Barclay, 441. For early use of the term see: "He professed himself to be neutral," and "thinking by their neutrality" (1550), in *New English Dictionary*, Vol. VI (2), 109, 110.

[65] Decree of Louis IX in 1252, of Phillip de Bel in 1312, and Bull of Boniface VIII in 1302; Hautefeuille, *Histoire*, 107.

[66] Rymer, Vol. I, 821; Vol. II, 747; Vol. II, 76; Vol. IV, 54; Guicciardini, Vol. VII, 265.

[67] Hautefeuille, 158; on origin of contraband see Atherley-Jones, Chap. 1.

[68] Hautefeuille, 178; Marsden, *Law and Custom*, Vol. I, 175; Dumont, Vol. V (1), 33 and Vol. V (2), 413; Reddie, Vol. I, 68; Selden, Bk. II, Chap. 20, neglects the subject very much.

The capture of enemy goods on friendly vessels was attempted also, and such attempts were, naturally, resisted, more particularly the extreme demand for a confiscation of the vessel itself.[69] The action taken varied between the rule of a French ordinance of 1584, making the friendly vessel liable to capture, and the rule of "free ships, free goods" contended for by the Hanse towns.[70] In the middle stood the old rule of the *Consolato del Mare* where enemy character alone was considered.[71]

Passing by the practice of blockade, one more form of sea power beginning to be claimed and exercised at this time, in view of the fact that it had not as yet become very clearly recognized,[72] we come to the practice of the arrest of, or the laying of an embargo upon, vessels in port or at sea at the outbreak of war, for use by the state.[73] Such ships might belong solely to subjects of the sovereign taking action, in which case merely a constitutional question was involved. But this action was soon extended by King John, and Edward III ordered his Admiral "to arrest and seize all ships . . . in the aforesaid admiralty (of the British seas)." [74] Such action was even contemplated in certain provisions of the *Guidon de la Mer,* a late sixteenth century maritime code, for times of peace.[75]

[69] Robinson, 105, 119.

[70] See English treaties of 1294 (Edward I; Portugal), 1327 (Edward III; Flanders), 1351 (Edward III; Spain) in Rymer, Vol. II, 632; Vol. IV, 328; Vol. V, 717. See also French treaties with Turkey (1604) and Holland (1612), in Dumont, Vol. V (2), 40, and Hautefeuille, *Histoire,* 178, n. 2.

[71] *Consolato,* Chaps. 274, 276, in Robinson, 119.

[72] Hautefeuille, *Histoire,* 188; Atherley-Jones, Chap. 2.

[73] Twiss, Vol. I, 353.

[74] Selden, Bk. II, Chap. 20, and *Rot. Pat.,* 9 John, 1–3, there quoted.

[75] *Guidon,* Chap. 9, Art. 13, in Pardessus, *Us,* Vol. II, 367, 372.

Finally, the pirate, so prominent in connection with this problem in Greek and Roman times, now provided excuse for further claims to maritime dominion. There was a practical need and obvious excuse for efforts to police the seas, a task in part undertaken by private interests but now taken over by the state.[76] Again piracy and interstate war had come close together. Hence French and British sovereigns were compelled to establish prize courts for the trial of pirates captured by their cruisers.[77] Piracy was hardly distinct from war, war hardly distinct, therefore, from peace. As a result, jurisdiction over pirates, easily admitted, might mean jurisdiction also over alien vessels in war and peace. The French Prize Ordinance already cited provided for trial of "all prizes . . . made at sea . . . as well under color of war as otherwise." [78] Privateering and reprisals in time of war and in time of peace were authorized very widely and, similarly, resisted and punished.[79] The result was to expand, in practice at least, national maritime jurisdiction in all directions. Elizabeth found it necessary to issue a proclamation in 1602 against both her own subjects and against aliens also for committing acts of piracy against friendly persons, against men who pretended "to make war against the enemies of her Majesty." [80] Such action —whether by subjects or aliens—had long been treated as treason.[81]

Here was a body of national law and practice relating to war and piracy on the seas, largely incorporated into

[76] Fulton, 5–6.
[77] Treaty of 24 May, 1497, in Robinson, 83.
[78] Robinson, 105.
[79] Same, 118.
[80] Same 21.
[81] Statute of Henry IV, cited in Nys, *Histoire*, 133.

and recognized by, a nascent international law, all of which looked in the direction of maritime jurisdiction, and in this respect was to be added to the long-standing claims to territorial dominion out of which in part it grew.

On the opposite side there was being built up a powerful theory of maritime freedom, based upon the principles of the law of Rome.[82] In part the civilians utilized the Roman law with little or no interpretation and modification. As has already been pointed out, this is a very dubious method of treatment. Accordingly, it is to the jurists who, taking the philosophical ideas embodied in the Roman law, transposed them into a theory of international relations, that we must look for the best work.

Vasquez, the great Spanish jurist of the early sixteenth century, denied the juristic value of the claims of not only the Venetians and the Genoese, but even of the Spanish crown.[83] He maintained that to make the seas and the waves into private national property was contrary to the law of nature and the elementary principles of international relations. They always retain, in their very nature, a complete freedom. The primitive law of nature is immutable. Prescription, being an institution of the civil law within the state, has no place in the law of nations. The result of its application would be inequitable, injurious, and inadmissable. The common use of the sea injures no one and, hence, has no natural prohibition to meet. Vasquez, it will be seen, did not succeed in getting very far beyond the Roman law itself.[84]

[82] For literature see Nys, *Origines*, 379, *Études*, Vol. II, 260; Ompteda, 518; Kamptz, 206; Kaltenborn, 124; Azuni, Vol. I, 23.

[83] Vasquez, Chap. 89, n. 12, quoted in Grotius, 52. On Vasquez see Nys, *Origines*, 382.

[84] Vasquez goes mainly upon *Digest*, XLI.

Donellus, the brilliant French jurist of the same century, attempted to strengthen the case by an analysis of the concept "public" or "common."[85] "Public" things, said Donellus, were either public in use or merely under public title. In the latter class are the proceeds from taxes. The former things are open either to public use by all men in one state or by all men in the world. The national highways fall under the former head, the sea under the latter. Thus the limited bearing of the Roman law upon the question of maritime freedom was in part avoided, in part amplified by daring discriminations which took account of special considerations and special circumstances. Even though Donellus repeated the old terms ("These four things are called common: air, flowing water, the sea, and, through the sea, that is, on account of the sea, the shores of the sea"), he at least corrected the naïve assumption that there was no gap between the problem in Roman law and the international problem. In the end he went on to extend the doctrine to fishing, the taking of gems, and navigation on the seas and rivers. He had however, little warrant for his rewriting of the law in this way.

Finally, Gentilis, more acclimated still to the international field, succeeded further in reworking the Roman principles for international use.[86] Gentilis started (1588) with the rule of the Digest: the sea by nature is open to all, as the air; it cannot be closed to any one; likewise the shores of the sea, the rivers, and their banks.[87] Ovid and Virgil are quoted in support; Cicero, Seneca, and

[85] Donellus, Bk. IV, Chaps. 2, 10, 11.

[86] In the *De Jure Belli*, Bk. I, Chap. 19; in his *Advocatio Hispanica* (1613) Gentilis merely reproduces his earlier views in a very incidental way.

[87] *Digest* I, 8.

Plato assist the Institutes, and all the ideas of the Stoic philosophy are set out as a beginning.[88] Then Gentilis notes the current opinion and practice to the contrary, the activities of the Venetians, who claim not merely practical possession but jural ownership, and other cases. The attempt so far made to reconcile such actions with the Roman principles he regards as a juggling of words. If the sea by law is open, then claiming a right to close it is illicit usurpation.

Gentilis made his escape by way of a distinction between dominion and jurisdiction. Under the latter heading he departs very far from the freedom which he predicates under the former. Restriction of imports, of immigration, and of exports, are justified for the sake of the safety and morals of the people. On the other hand, he holds that sea-dominion is inadmissable; a denial of nature's facilities is a just cause for war, as are exclusion from ports and straits, denial of intercourse, and of trade. The complaint of the Megareans against the Athenians is upheld. "For commerce is under the law of nations." What Gentilis is really doing is weighing conflicting arguments, especially practice against theory; that he does not secure an entirely clear result in point of theory is characteristic of his juristic work in general.

Gentilis did, however, attain a more balanced position than any writer, with, perhaps, one exception, was to attain for over a century.[89] His conclusions may be summed up as follows: The sea is common for all to use it, the property of no one individual or nation, but

[88] Virgil, *Aeneid*, I, 563; VII, 203; Cicero, *De Officiis*, I, 15; *Institutes*, II, 1.

[89] The exception is Stypmann (1652); even Stypmann fails to obtain a wholly unified solution, and as his work had, apparently, no influence on the growth of general doctrine he may be left largely out of account.

merely under the protection of the prince. Under the law of nations national jurisdiction for protective purposes is recognized wherever and in so far as it is necessary. No one who sails the sea may escape from just government. Yet they war justly on a prince who denies them the innocent use of nature's gift.

Needless to say, Gentilis was a voice crying in a wilderness of confusion and contention. At the end of the sixteenth century there arose from all quarters demands for national dominion over the sea, for authority at sea over peaceful merchant vessels, over pirates, over merchant vessels in time of war, over fishermen and all who used the sea. On the other side arose the objections of the civilians and the philosophers, declaring that the sea was free by natural law and that no man and no nation could deny men the use of nature's highway in any degree or manner.

In such circumstances three things were very likely to happen. The nations were almost certain to take sides in accord with what they at the time considered their national interests, not in accord with what they believed to be sound principles of law. The two contending views were, in the second place, likely to overreach themselves in their excess of zeal and fall back into a compromise. And, finally, it could be hoped that some scholar would work out a reasonable synthesis of the conflicting views for a permanent solution of the problem.

As we have seen, the last event had actually taken place already. Gentilis had begun the scientific synthesis of the ideas of maritime dominion and maritime freedom which was ultimately to be accepted as the solution of the problem of maritime territorial jurisdiction, at least in point of principle. But this acceptance was to be long

delayed, and we must leave this thread of the story until later.

The second probability may best be studied in terms of the controversy between Grotius and Selden. Just as the seventeenth century opened the claims of both parties reached their utmost extension in the works of these two writers. To those works we shall turn in the next chapter.

Finally, the relation between national interests and the legal doctrines adopted in the premises may be brought out by reference to certain famous utterances of Elizabeth in 1580 and 1602. The British attitude on the question in general has been fully described already.[90] But when, in 1580, the Spaniards claimed to exclude British vessels from the Indies, Elizabeth declared to Mendoza, a Spanish envoy, that "the use of the sea and air is common to all, nor can a title to the ocean belong to any people or private persons, forasmuch as neither nature nor public use and custom permit any possession thereof."[91] Likewise when King Christian of Denmark threatened to exclude the English from fishing in the North Sea she declared that "fishing on the high sea was free by the law of nations and the customs of all peoples," and that "the law of nations allowed fishing in the sea everywhere, even in seas where a nation hath power of command."[92] And her commissioners, treating at Bremen with emissaries of King Christian, went upon the ground of "a perpetual community of every kind of sea, from the law of nations."[93] A later writer suggests that the commissioners

[90] See also the extremely interesting *Libell of Englishe Policye*, below, Appendix A.

[91] Camden, for the year 1580, 428–429.

[92] Nau, § 81; Ogilvie, 95. Henry VII had admitted Danish control of these same fisheries; same, 94.

[93] Camden, year 1602.

may have selected their ground out of deference to the tastes of their opponents. That writer was John Selden.[94] What influence such nationalistic considerations had on Selden and Grotius we shall soon see.

[94] Selden, Bk. II, Chap. 24.

CHAPTER IV

THE GROTIUS-SELDEN CONTROVERSY

From the preceding review of the international practice and scientific discussion concerning the freedom of the seas in ancient and mediævel times it will readily appear that the opening years of the seventeenth century were peculiarly appropriate for a definitive debate upon that momentous subject. The practice of the past, the theoretical critique of that practice, and the rapid appearance of a number of independent and influential national states in western Europe made some more generally accepted ruling on the question imperative. The times called for a set debate between the partisans of maritime dominion and maritime liberty.

Against this background there appeared certain special causes and specific events which actually led to the great controversy between Grotius and Selden and their hosts of coadjutors and collaborators on either side.

It appears that, in 1602, a Dutch East India Company captain seized a Portuguese galleon in the Straits of Malacca, in defiance of efforts being made by Spain and Portugal to compel the Dutch to renounce their rights to trade in the East and West Indies. It seems that a young lawyer, Hugo Grotius by name, was retained as counsel for the East India Company in the proceedings before the Dutch admiralty court where the vessel and cargo were, on 9 September, 1604, declared good prize. It further appears that Grotius was led to expand his

ideas on the questions before the court into a treatise on the law of prize, of which the twelfth chapter dealt with the general subject of the freedom of the seas, in refutation of the Spanish and Portuguese claims of exclusive control. At all events, there appeared, in 1609, a small work on that subject, entitled *Mare Liberum,* and this marked the definitive statement of the case from one side, although a later work by Grotius and many writings by contemporary partisans of maritime liberty joined the volume of argument against the idea of sea dominion.[1]

The work of Grotius led the English jurist John Selden to compose, in the years 1617 and 1618, a treatise which, revised, altered, and enlarged some sixteen years later, finally appeared in 1635 under the title *Mare Clausum.*[2] The revision allowed Selden to take into account the views of Grotius as expressed in the *De Jure Belli ac Pacis* published by the latter in 1625. This work of Selden constituted the main defense of the doctrine of maritime dominion, although it also was supported by many writings of the same purport by other students and propagandists of the day.[3]

It is impossible adequately to appreciate the nature and

[1] On all this episode see Fulton, 342–344; Nys, *Études,* Vol. II, 260, and *Origines,* 382–387; Pillet, *Fondateurs,* 131; and Vreeland, 43. The definitive edition of the treatise on prize law in general is that by Hamaker, under the title *De Jure Praedae;* for Chapter XII see same at 204.

[2] On preparation of Selden's work see Fulton, 366–368. Publication was held up for political reasons—fear of hurting prospective Danish creditors' feelings—it appears; Twiss, Vol. I, xiii.

[3] See Scott's *Introductory Note* to the *Mare Liberum,* viii, and Needham's *Epistle Dedicatory,* 3; also Selden, Bk. I, Chap. 4; there are evidences in the text that Selden worked on the treatise as late as 1635 (Bk. II, Chap. 23).

value of the Grotius-Selden controversy without a notice of the play of economic, political, and personal motives from which it emerged.

Grotius quite freely accused the Portuguese and Spanish of greed and avarice in seeking a commercial monopoly in the Indies.[4] He demanded satisfaction for his countrymen in "the right which belongs to the Dutch to take part in the East India trade."[5] He began his work as paid counsel for a great trading corporation.[6] His conclusions appear often to have been subject to the influence of his wishes.[7] He, of the Protestant and revolutionary Netherlands denied the validity of Papal donations to create maritime monopolies on behalf of the Catholic monarchs.[8] His compatriot, Dirk Graswinckel, was concerned chiefly with the right of the Dutch to fish in British waters,[9] a subject to which Grotius had paid so little attention that he had been willing to hail James I of England as "Royal Governor" of the British Seas.[10]

Selden, on his part, was somewhat concerned with the fisheries and the Dutch claim in that particular,[11] but he left that narrow topic largely to William Welwod, a Scotch writer who had seen in Grotius' arguments merely a claim such as that actually put forward by Graswinckel.[12] Sel-

4 Grotius, 37–38.

5 Same, subtitle, and 7, 71.

6 Same, Scott's *Introductory Note*, vi. Grotius says at one point that the sea "seems" to resist dominion; see Grotius, 28.

7 Compare Perels' characterization of the work as a *"Tendenzschrift"*; Perels, § 4.

8 Grotius, 46.

9 Fulton, 375–376.

10 *Poemata Collecta*, 78.

11 Needham, *Epistle Dedicatory*, 6.

12 Welwod, *Abridgment*, 27. Welwod is quite willing to admit

den turned to the broader aspects of the problem of maritime dominion in general.[13] He also had very definite ideas concerning Grotius' aims. Admitting Grotius' learning and humanism, Selden nevertheless accuses him of "disputing for the profits and interest of his own country" even by resorting to obscurantism.[14] He attacks sharply the Roman law and the continental civilians relied on by Grotius.[15] Only such as have no sea of their own decry the idea of maritime dominion, he protests, or such as may be injured by some other person's dominion.[16] Freitas, writing in 1625 on behalf of the Portuguese, takes his cue almost entirely from the religious and political situation in the Netherlands.[17]

Certain strictly national or international aspects of the controversy throw added light upon the situation. Thus, in upholding the British claim to sea dominion in the Channel, Selden is forced to disprove the French claims to a like dominion. This leads him to a critique of the French claims which might be turned against his own case with great effect.[18]

Through all this period England was engaged in what became at times rather sharp negotiations with the Dutch in regard to fishing rights in the North Sea. The Dutch were reminded by a coadjutor of Selden that Grotius himself was at the time under arrest and "his honesty called

Grotius right against the Portuguese, in whose claims he, Welwod, had no interest, just as Grotius had been willing to admit maritime dominion where it did not interest him or his clients. Graswinckel's work here in question was a pamphlet directed specifically "against William Welwod."

[13] Selden, Bk. II, Chap. 1.
[14] Same, Bk. I, Chap. 26.
[15] Same, Bk. I, Chaps. 15–17.
[16] Same, Bk. I, Chap. 17.
[17] Freitas, 1–3.
[18] Selden, Bk. I, Chap. 18.

in question by themselves." [19] The Dutch are advised "to seek leave (to fish in British waters) from his Majesty and to acknowledge him his right . . . or it may well come to pass that they that will needs bear all the world before them by their *Mare Liberum* may soon come to have neither *terram et solum* nor *republicam libram*." [20] The English Minister resident at The Hague was told that "*Mare Liberum* must be answered with a defense of *Mare Clausum*, not so much by discourse as by the louder language of a powerful navy." [21] Selden's treatise was adopted in the libraries of the Privy Council, the Court of the Exchequer, and the Court of Admiralty, as an approved embodiment of British public policy.[22]

In short, the works of Grotius and Selden and their coadjutors were products of personal and national desires rather than works of pure and unbiased juristic science. Nevertheless, it is upon the soundness of their arguments that they must be judged, and to the contents of these works we now turn.

Of the two works, that of Grotius is much the briefer. After frankly avowing his object, to defend Dutch trade rights, in his subtitle, Grotius appeals in his Preface for an audience to his plea and a just verdict by the rulers and free nations of Christendom. In thirteen short

[19] Needham, *Additional Evidences*, 470.

[20] Needham, *Additional Evidences*, 470. Needham also attacks the Dutch for their "insolencies" and ingratitude; *Epistle Dedicatory*, 4.

[21] Penn, *Memorials*, Vol. I, 513.

[22] Graswinckel alleged that Selden composed the *Mare Clausum* to win the favor of Charles I so as to be released from prison where the latter had confined him for opposition in the House of Commons; Nys, *Origines*, 386–387. See also, on this point, the facts as independently given in Fulton, 367, and Nys, *Origines*, 386. For official endorsement given to the work by Charles see Fulton, 366–369, especially 367, n. 1.

chapters he then sets forth the general principles which, under the law of nations, make maritime navigation free to all;[23] denies the title of the Portuguese to the East Indies by discovery, Papal grant, or war;[24] disputes the claim of the Portuguese to control navigation in the Indian Ocean;[25] denies the force of Papal authority, prescription, or custom, to create sea dominion;[26] and then restates the arguments of his earlier chapters more specifically against the Portuguese, and with all emphasis now upon the right to trade, not merely to navigate.[27] He concludes by exhorting the Dutch to maintain their rights by diplomatic or—if need be—military action.[28] "Therefore, if it be necessary, arise, O nation unconquered on the sea, and fight boldly, not only for your own liberty, but for that of the whole human race."[29]

Selden's treatise was divided into two books. Book the first[30] attempts to prove by reference to holy scripture, ancient and mediæval state practice, reason, and equity, the possibility and actuality of maritime dominion in general.[31] The arguments of Grotius are examined and refuted,—to Selden's satisfaction, at least A great deal of learning is expended, as a preliminary effort, in defining the terms "sea," "law," "dominion" and others.[32] Finally,

[23] Grotius, Chap. 1.
[24] Same, Chaps. 2–4.
[25] Same, Chap. 5.
[26] Same, Chaps. 6, 7.
[27] Same, Chaps. 8–12.
[28] Same, Chap. 13.
[29] Same, 73.
[30] "In the first book it is shown that the sea by the law of nature or nations is not common to all men but is capable of private dominion or property as well as the land," Selden, Bk. I, subtitle.
[31] Same, Bk. I, Chaps. 5–19.
[32] Same, Bk. I, Chaps. 3, 4.

replies are drawn up to the arguments of the Roman jurists, orators, and poets cited by Grotius.[33] In the second part of his work Selden describes the dominion held by Great Britain over the seas surrounding the isle, as a special case or example of the application of the principles set out in the first part of the work.[34] After a forecast of the order of treatment in this part of his book, and a discussion of the geography of the regions in question,[35] Selden proceeds to show by all sorts of documentary, numismatic, and historical evidence how the British have held a dominion in the circumjacent seas from pre-Roman times to the seventeenth century.[36] Evidences of recognition by foreigners of this dominion are exhibited.[37] Finally, special studies are made of the Irish, Scotch and Northern Seas.[38] Selden concludes: "And without question it is true, according to the collection of testimonies already exhibited, that the very shores or ports of the neighboring princes beyond seas are the bounds of the sea-territory of the British Empire to the southward and eastward, but that in the open and vast ocean of the north and west they are to be placed at the utmost extent of those most spacious seas which are possessed by the English, Scots, and Irish." [39]

For proof of his contentions Grotius relied chiefly upon the Roman law, as he understood it, and the doctrines of

[33] Selden, Bk. I, Chaps. 23–26.

[34] "In the second is asserted that His Most Serene Majesty, the King of Great Britain, is Lord of the sea round about, as of a distinct and perpetual appendant of the British Empire"; Selden, Bk. II, subtitle.

[35] Same, Bk. II, Chap. 1.

[36] Same, Bk. II, Chaps. 2–25.

[37] Same, Bk. II, Chaps. 26–29.

[38] Same, Bk. II, Chaps. 30–32.

[39] Same, Bk. II, Chap. 32.

Roman poets, orators, and philosophers. Not writing in reply to any specific argument, but yet writing to deny a specific claim, Grotius did not, on one hand, meet in detail the arguments of the partisans of maritime dominion in general, while, on the other, he devoted his attention mainly to the Portuguese claims to the neglect of the British case. Selden, on his part, derived considerable advantage from treating the subject as it had been left by Grotius, for he was able at once to answer Grotius point for point and also to treat the matter more comprehensively than his predecessor. And in both tasks he relied not so much on legal theory and philosophy and ethical ideals as on actual historical practice and the established facts of state power and control.

Both writers employ a wealth of illustration, cite numberless writers of high and low degree, indulge in metaphysics and abstractions in equal amounts. Because his work is larger and therefore gives him opportunity for a greater absolute number of citations, and because he ranges over such a wide field of study, Selden seems to be heavier and more pedantic than Grotius.[40] The latter, because of his human sympathies and idealism, which appear along with his support of Dutch interests and are identified with them, seems more generous and admirable in spirit than the hard-headed and selfish Britisher. Moreover, Selden was fighting against the tendency of historical international developments, while Grotius was fighting the battle of the future. But as argument attempting to prove the legal validity of maritime dominion or maritime liberty in the period prior to 1650, Selden's work is incomparably superior to that of Grotius in the opposite capacity.

[40] Scott, *Introductory Note*, ix.

It would be unprofitable to follow Grotius and Selden in their treatment of the subject in their own way, in view of the influence of the special causes which they were pleading upon the order of treatment pursued. From what they wrote as a whole, however, and taking some account of the other materials already reviewed, it will be useful at this point to make an analysis of the problem in general terms.

The principal question to be answered by any student of the problem as it stood in 1600 was: may a dominion over the sea be acquired by individual nations? In answering that question the nature of the dominion desired was to be defined at once. It meant at the most the right to treat maritime territory on a par with continental or landed territory, so as to exclude aliens entirely from its use; it meant, in lesser degrees, the right to impose conditions upon entrance and use—while not denying, or being permitted to deny, such entrance and use entirely—; or to charge tolls for the same; or to exercise police supervision in matters of navigation, quarantine and customs, and to charge fees in connection therewith.

Second, if dominion might be acquired, how was this to be achieved? By what steps on the part of the acquiring state, and as a result of what measures of acquiescence on the part of other states?

The use desired by aliens and attempted to be denied by the littoral state might, further, mean a use for fishing, navigation, the taking of gems, or landing for any one of many purposes such as personal sojourn, trade, refuge from storms, and what not.

Having defined the dominion in prospect, what are the subdivisions of the sea to which these degrees of dominion may or may not be applied? Is the sea uniform in character in being subject to dominion, or utterly free from

it, in all its parts? Or does the treatment properly to be applied to it vary from one part to another?

Does the treatment vary in time of peace and in time of war, or is war entirely irrelevant in this connection?

Finally, upon what bases must all conclusions rest in this matter, natural reason and justice, state practice and agreements, the law of Rome, or what else?

Having settled the question in principle the student might pass on to inquire whether any state had acquired any degree of dominion over any portion of any particular sea, and, if so, where, when, and how. Different students varied the degrees of emphasis given to the principal question and to the secondary question. Apologists were mainly concerned with establishing some particular national or royal claim.[41] Both Selden and Grotius were led to undertake their work with this in view also. But Selden and Grotius both devoted considerable attention to the question of principle before turning to their special pleas on behalf of English and Dutch claims, respectively, and the treatment of the latter amounted chiefly to a restatement, with reference to particular circumstances, of what they had already said on the general question.[42]

Grotius, of course, answered the first question of the problem in the negative. No nation could acquire a dominion over the sea, as a general proposition.[43] In the *Mare Liberum* Grotius did not take pains to define the content of "dominion" with any fullness, nor did he define "the sea" so as to make it clear that he definitely intended his principle to apply equally to all portions thereof. The

[41] So: Burgus, *De Dominio Genuensis Reipublica;* Freitas, *De Justo Imperio Lusitanorum.*

[42] But might occupy as much, or more, space; Grotius, Chaps. 6, 7, 9–12, and Selden, Bk. II.

[43] Grotius, entire, especially 7–10.

general implication in that work is, however, that no variety of dominion could be acquired in any way over any part of the sea.

More particularly, Grotius denied the right of exclusion as efforts might be made to apply it to fishermen [44] or to navigators.[45] It was with the latter point that he was chiefly concerned, as we have seen already.[46] He makes no mention of the taking of gems,[47] but he does place great emphasis upon the right to land, or, more specifically, the right to trade.[48] The Dutch did not desire merely the right to sail the seas for pleasure, of course; it was their right to trade that was back of the demand for a right of navigation.[49]

Concentrating his attention upon the Portuguese claim to a right of exclusion, Grotius does not deal in the *Mare Liberum* with the possibility of lesser rights of police supervision. In the *De Jure Belli ac Pacis*, however, he takes careful note of the possible distinction between exclusive ownership and mere jurisdiction. He noted, even in his earlier work, the presence of this distinction in the law of Rome.[50] In the later work he goes so far as to

[44] Grotius, 32.

[45] Same, 7. In his later work Grotius denies the right even to tax navigation. *De Jure*, Bk. II, Chap. 2, § 4, ¶ 1, and Bk. II, Chap. 3, § 14, ¶ 1.

[46] Grotius states his chief object thus: "My intention is to demonstrate . . . that the Dutch . . . have the right to sail to the East Indies . . . "; Grotius, 7.

[47] In the *De Jure Belli ac Pacis* he defends the taking of water from the sea; *De Jure*, Bk. II, Chap. 2, § 3, ¶ 1.

[48] The sentence just quoted (note 46) concluded: "and to engage in trade with the people there."

[49] Grotius emphasized the right of entry and trade throughout his entire work; Grotius, 8, 9, 64 (*adire, peregrinari et degere, negotiari, contrahere*); Chaps. 1, 5–7 deal with the right of navigation, Chaps. 8–13 with the right to trade.

[50] Grotius, 35.

conclude: "That, moreover, jurisdiction in a part of the sea should be occupied without any right to property could more easily come about, nor do I think that this would violate the law of nations." [51] But even here he does not develop the idea in any detail.

Denying in general the possibility of acquiring sea dominion as a whole, Grotius naturally gave little attention to the way in which it might be acquired, if at all. Nevertheless, he did take the trouble to say that, if the sea could be subjected to national sovereignity at all it must go to him alone "who holds in his power the nearest ports and circumjacent shores." [52] Just how important this was will appear later.

Similarly with respect to the distinction between outer and inner seas, Grotius was inclined to ignore the question in his earlier work because of his preoccupation with the specific dispute under discussion. [53] On the other hand, when he did take note of the distinction at isolated points in the *Mare Liberum*, and when he came to deal with it more fully in his later work, he recognizes its force and takes it into account by admitting both private property and national dominion in inlets, bays, and inner seas generally.[54] "Illogical" or not,[55] these qualifications are extremely important in rendering Grotius' views more moderate and balanced. Needless to say, in the *De Jure*

[51] *De Jure*, Bk. II, Chap. 3, § 13, ¶ 1. The word here translated "jurisdiction" is "*imperium*"; "property" is, of course, "*proprietatis*." In § 4 Grotius says: "Two things are open to occupation, jurisdiction (*imperium*) and ownership (*dominium*)."

[52] Grotius, 43.

[53] Here not even such comparatively limited seas as those in which Selden was interested were in question, but the open Atlantic and Indian Oceans; Grotius, 22, 37.

[54] Same, 32; *De Jure*, Bk. II, Chap. 3, § 8.

[55] So stygmatized by W. E. Hall (*Treatise*, 7th ed., 147, n. 2).

Belli ac Pacis Grotius fully includes rivers and ponds in the national territory.[56]

What is more important still, Grotius insisted that it was the status of the open sea that was in question entirely. "The question at issue is not, then, one that concerns an inner sea, one which is surrounded on all sides by the land, and at some places does not even exceed a river in breadth. . . . No! The question concerns the outer ocean . . . the immense, . . . the infinite." "Further . . . the question at issue does not concern a gulf or a strait in this ocean nor even all the expanse of sea which is visible from the shore." [57] Also: "For they are discussing the Mediterranean, we . . . the ocean, they . . . a gulf, we . . . the boundless sea; and from the point of view of occupation, these are wholly different things!" [58] This attitude was due in part to historical causes, in part to dialectical tactics, but it has a decisive effect on the value of Grotius' conclusions.

As for the question in time of war, it had no special meaning for Grotius. He was discussing navigation and trade without reference to a state of war or the rights, as we should say, of belligerents.

General notice has already been taken of the nature of the foundations upon which Grotius rested his contentions. More specifically it should be noted that the great jurist is somewhat unduly fond of arguing from "the recognized authorities." He relies heavily on Vasquez, who, in turn, "had established his point by the help of many authorities." [59] Closely akin to this method of proof is the practice of citing "nature" or the divinity—"*Deus*

[56] *De Jure*, Bk. II, Chap. 3, §§ 7, 18, and Chap. 8, § 2.
[57] Grotius, 37.
[58] Same, 58.
[59] Same, 55.

ipse," the "Father of this human family" the "Divine Source," and so on.[60] From this to the citation of "right reason," "reason," and then "just reason" or "equity" is a short step.[61] The "ought" of the matter begins to make itself felt,[62] at once weakening Grotius' account of actual practice but, probably, strengthening his case for maritime freedom in general.

When he deals with actual practice and attempts to base his conclusions on customary law Grotius is compelled to search carefully, and to distinguish minutely between one sort of practice and another. By diligent search he is able to find in history [63] a number of cases of the free use of the sea, and by careful distinction between inconclusive usage or even usurpation, on one hand, and binding custom, on the other, he is able to set aside most of those cases of sea dominion which were omnipresent in his age.[64] The latter he admits much more freely in the *De Jure Belli ac Pacis,*[65] where sea dominion is accorded greater recognition.

Grotius was really moved by what he felt was a general popular will or desire, in demanding a free sea.[66] He felt that maritime liberty was good policy, from the national and the general international viewpoint.[67] He identified

[60] Grotius, 2, 7. Also "Divine Providence, and "Nature"; same, 8, 30, 53.

[61] Also "Natural judgment (*judicium*)"; same, 22, 43, 57, 69.

[62] "Since it ought (*debet*) to be common to all men"; same, 28.

[63] Same, 9.

[64] Same, 33, 52.

[65] *De Jure,* Bk. II, Chap. 3, § 13.

[66] Grotius, 31 (*voluerunt*); 38 (*consensu gentium*); also *De Jure, Proleg.,* § 40, and Bk. II, Chap. 2, § 2, ¶ 5, and § 13, ¶ 1; also Chap. 3, § 5 and § 10, ¶ 3.

[67] *Utilitatem publicam,* and *utilitatem communem* in *De Jure,* Bk. II, Chap. 2, § 24 and Chap. 3, § 6; arguments from expediency: *Mare Liberum,* 39, 57.

the Dutch claim with general human welfare,[68] with the interest of "the society of all human kind." [69] Public policy or public utility bulks large in Grotius' mind at all times, and deeply colors his legal doctrines.[70]

On the other hand, Grotius denies that such a vital thing as freedom of the seas depends on charity or comity or humane considerations.[71] It is obligatory, although the source of the obligation may be the utility of the arrangement in the long run. Grotius thus seeks to utilize the force of the consideration of utility without suffering the effects of its weakness.

Finally, Grotius attempted to utilize a still simpler form of argument, the argument from the physical nature of the sea.[72] The sea is vast, it is free, it is open. It is intangible.[73] Boundaries therein could not be clearly defined.[74] The products of the sea are so manifold and plenteous that monopoly is impossible and unnecessary.[75] In the enjoyment of the varying resources of the sea all men and nations must be free.

All of this reasoning is summed up in a theory of property, individual and national, which embodies in one system of thought Grotius' conclusions upon the entire

[68] Grotius, 3.

[69] Same, 70.

[70] So the idea of a unified human society is at the bottom of his view of all such problems: "law of human society," *Mare Liberum*, 9. Also: *De Jure*, Proleg., § 17, and Bk. II, Chap. 3, § 5.

[71] *Non ex caritatis regula*, in *De Jure*, Bk. II, Chap. 2, § 6, ¶ 4. In the *Mare Liberum* Grotius had used some examples which could easily be explained, as Selden contended—Selden, Bk. I, Chaps. 20, 23—on this ground.

[72] Grotius, 31.

[73] Same, 28.

[74] Same, 31, and *De Jure*, Bk. II, Chap. 2, § 3, ¶ 2.

[75] Grotius, 7–8, 38.

question of sea dominion. Rather than examine this summary of the argument for maritime liberty, however, it will be useful now to compare Selden's views on the foregoing points with those of Grotius.

Selden held that, in general, dominion over the sea was legally possible.[76] That dominion was to be a full title. Selden definitely denied the validity of the distinction between dominion and jurisdiction, held that "it is not to be conceived that any other kind either of causes or effects of sea dominion are here admitted than such as have been (admitted) of an island, continent, port, or any other territory whatsoever."[77] He holds that the Venetian power operated on the Adriatic itself against "any other" who wished to use it.[78] This is one case where Selden appears to be guilty of over-generalization, and of being less realistic than his philosopher opponent, contrary to the general impression. This attitude weakened Selden's case in the long run, as Grotius' attitude had strengthened his case. Selden was led to take that attitude by greed for greater and greater dominion. Grotius might easily have taken his opponent's doctrine as by him put forward and attacked it more easily because of its extravagence.

Selden had a term of his own to explain in this connection, namely *clausum*. He explained that a "closed" sea was one privately owned (*possessum*) and so excluded (*seclusum*) from general use as to be no longer common.[79] In effect this merely meant that Selden believed

[76] Selden, subtitle: *"Mare ex Jure Naturae seu gentium omnium hominum non esse commune sed dominii privati seu proprietatis capax pariter ac Tellurem.*

[77] Same, Preface.

[78] Same, Bk. I, Chap. 16. The Venetians were looked on, he holds, as lords of the Adriatic "by as unquestionable and full a title as of their land and city"; same, Bk. I, Chap. 16.

[79] Selden, Preface.

that dominion over the sea gave a right of exclusion.

This he did contend, in full measure, whether applied to fishing, navigation, the taking of gems, landing and trading, or anything else.[80] He also contends for a right of levying tolls, imposing conditions of admission and, in general, exercising all subordinate rights which might flow from full dominion.[81] The growth of commercial fishing made that subject important to Selden, as his discussion of the matter shows. Navigation, on the other hand, lay at the very centre of his case on behalf of British sea control. The obviously exhaustible character of the store of fish and gems in the sea, further, assisted Selden in his argument.[82] And the dangers to the realm of admitting alien travellers and traders in ports of the kingdom could be emphasized with great effect.[83] Accordingly he extended his argument to cover them all.

Selden's attitude toward the distinction between inner and outer seas was not simple. He could not treat the inner seas as specially adapted to national dominion without implying some doubt concerning the outer sea, and this he would not do. Yet he was compelled to recognize the distinction to some extent. In denying the dominion of the Zealanders in the North Sea in competition with Britain he excepted from his denial "the ports and inner

[80] Fishing: Bk. I, Chap. 22; navigation: Bk. I, Chap. 16 ("the Venetians have the right to prohibit any to pass or to impose a custom on those they permit"; see also Bk. II, Chap. 2: "that leave of preter-navigation which hath been usually either granted by Britain to foreigners or requested by them").

[81] Taxing and licensing fishermen: Bk. II, Chaps. 14–18, especially 15, and 20–22.

[82] Bk. I, Chap. 22.

[83] Bk. I, Chap. 20 ("the common weal may receive . . . damage"). The subject of trade connected the problem of freedom of the seas with mercantilist economics; Nys, *Origines*, 384–387 (*cujus regis ejus commercium*).

places of the sea included within their islands."[84] A similar allowance is made for the benefit of the Spaniards.[85] Moreover, his attention was in fact directed almost entirely to the "British seas" in and around the British isles, to coastal waters, gulfs, and bays.[86] On the other hand, when the question of the high sea clearly arose Selden stood firm for maritime dominion there also, denying that the outer differed from the inner sea in its susceptibility to control.[87] While not unaware of the already well-developed discussions of Bartolus and Bodin regarding the exact demarcation between inland waters and the open sea,[88] Selden, for the most part ignored the question entirely.[89] Again Selden, the supposedly "practical" man, is guilty of over-generalization and a lack of realism. In the subsequent history of the problem this attitude weakened the case for sea dominion while that of Grotius actually served to strengthen it.

In one particular Selden plainly revealed in this very connection, the inherent divergence of his theory and that of Grotius. Selden denied the necessity for possession of adjacent shores in order to a claim of sea dominion.[90] He had in mind the use of naval forces as well as coast artillery. In other words, he had in mind any part of the seas of the earth, irrespective of breadth or loca-

[84] Selden, Bk. II, Chap. 25.

[85] Same, Bk. I, Chap. 17.

[86] Same, Bk. II, Chaps. 2, 3, 6, 9–10, 22.

[87] "As well the main ocean or outland seas as those which are within land, such as the Mediterranean . . . British . . . or any other of that kind, which differ no otherwise from the main than as . . . parts of the same body do from the whole"; same, Bk. I, Chap. 3.

[88] Same, Bk. I, Chap. 22.

[89] Or dealt with it in most general terms ("the neighboring sea," "a part of the sea"; same, Bk. I, Chap. 15).

[90] Same, Bk. I, Chap. 22.

tion.[91] This even though he was in fact chiefly concerned with waters controllable from the land.

To Selden the existence of war strengthened considerably the dominion of the sovereign over his maritime territories. The (neutral) British nation must be protected, in time of war, from the fighting of belligerent vessels near the shore.[92] Neutrals must be prevented, when Britain was at war, by the exercise of the right of sea dominion, from carrying supplies to the enemy.[93] This leads Selden to restrict still further the privilege of navigation in the sea under control of the sovereign, and to prohibit hovering by foreign men-of-war.[94]

For proof of his case Selden, as has been seen, relied chiefly upon state practice and acts of state authority in the past. Nevertheless, he was not free from simple dogmatism—indeed, he was probably more inclined to make violent assertions on his own responsibility than was Grotius. At one place he retorts that what others affirm "we do as easily deny";[95] at another that "quite the contrary is most certainly known"—when confronted with a contention of Vasquez.[96]

On the other hand, Selden does not rely upon "the authorities" as extensively as does Grotius—whom he chides for his servility to the Civilians.[97] Nevertheless,

[91] "The utmost extent of those most spacious seas"; Selden, Bk. II, Chap. 32.

[92] Same, Bk. II, Chaps. 20, 22.

[93] Same, Bk. II, Chap. 20; Selden insists that the belligerent's control of neutral trade in time of war flows from sea dominion, not from an independent source.

[94] Same, Bk. II, Chap. 22, citing proclamation of James I, dated 1 March, 1604, from *Rot. Pat.* 2 James 1.

[95] "We do as easily deny as any other man can affirm," Bk. I, Chap. 20.

[96] Bk. I, Chap. 26.

[97] Bk. I, Chaps. 16, 26.

it is noteworthy that Selden is willing to cite the despised Vasquez when Vasquez can be cited on his side of the case.[98] Further comment is unnecessary.

If the Civilians gave Selden little comfort and support, God and Providence gave him less.[99] Selden is not preaching an inspired and exalted doctrine, but a practical rule of men. He did recognize the existence of natural law,[100] but included therein a permissive law which made variations from the fundamental principles comparatively simple.[101] He could thus introduce all his data on state practice as altering the original injunctions regarding free use of the sea,[102] while—for greater safety, —denying that even in the obligatory part of the law of nature there was anything positively to prevent sea dominion "as is acknowledged by all the nations of Europe except some perhaps who are not yet in fair and lawful possession of any sea." [103]

This turn of the argument allowed Selden to display all his evidence concerning state practice, custom, and usage.[104] The positive law of nations, based on practice, recognized sea dominion. He draws up two lists of sea-rulers similar to that of Eusebius of old.[105] To Selden the evidence is utterly conclusive on the general question of the possibility of sea dominion, whatever the value

[98] Bk. I, Chaps. 14, 17.

[99] See, however, references to "God" and "divine law" in Bk. I, Chaps. 3, 6.

[100] His theory of law is set out in Bk. I, Chap. 3.

[101] Bk. I, Chap. 3.

[102] Bk. I, Chap. 5: "All these things came in from the alteration of that universal or natural law of nations which is permissive; for thence came in private dominion or possession, to wit, from positive law."

[103] Bk. I, Chap. 17.

[104] Bk. I, Chaps. 5, 7.

[105] Bk. I, Chaps. 8–19.

of individual national claims in one case or another.

If the righteousness or ideal value of sea dominion troubled Selden little, it was, on the other hand, even more imperative for him to prove consent in each concrete case and thus, indirectly, consent to the institution of sea dominion in general. While he had denied that, by the fundamentals of natural law, the sea was necessarily free, his great emphasis on the foundation of practice made a proof on this line specially necessary. Hence his great efforts to prove consent by foreign nations to the Venetian and British displays of power at sea.[106]

Selden frankly admitted that considerations of national safety, national policy, and national interest dictated his conclusion on the principal question.[107] He was not concerned, as was Grotius, with general international or general human utility. The individual nation was the last word for him, as far as legal rights were concerned. Humanity as a whole might be considered as far as the nation saw fit; charity and generosity could have full play within the limits already defined, but only within those limits.[108]

Finally, Selden was directly in his element in replying to Grotius' suggestions concerning the physical nature of the sea. The sea could be bounded as well as the land, by the use of high rocks, islands, promontories, and the lines and angles of mathematics, as in the plantations in America.[109] The stores of the fish are obviously not inexhaustible nor the stores of precious stones.[110] The sea is no more fluent than rivers, which are clearly under

[106] Selden, Bk. I, Chaps. 12, 16, 17.
[107] Same, Preface; Bk. II, Chap. 30.
[108] Same, Bk. I, Chaps. 20, 23,
[109] Same, Bk. I, Chap. 22.
[110] Same, Bk. I, Chap. 22.

dominion—indeed, it is less fluent.[111] In short, Selden denies all the allegations of fact in this direction.

It will be seen that Grotius and Selden diverged very widely on the surface. It also appears, however, that, if they had been brought face to face, with a mediator present to reconcile their conflicting views, it might well have been possible to secure from them an agreement to a single code or set of rules governing the case. What would be the nature of such a solution?

Both Grotius and Selden admitted that in the beginning the sea was free from all dominion.[112] Grotius held that natural law enjoined a continuance of such a status; Selden that it did not.[113] For the high sea Grotius could not yield to Selden here. The latter, on the other hand, while stoutly contending, when challenged, that the open sea was susceptible of dominion, felt some embarrassment over this claim[114] and was chiefly interested in more limited portions of the sea. The two students of the problem then, would come closer together by simply turning to the inner seas. Selden could ask from Grotius a frank admission of the possibility of sea dominion in such waters, which Grotius could readily give,[115] in exchange for an agreement on his part to confine his attention to those parts of the sea. Selden would then be called on for a further concession, namely, the recognition of the possibility of jurisdiction without dominion. To this he

[111] Selden, Bk. I, Chap. 21.

[112] Grotius, 23; Selden, Bk. I, Chap. 4.

[113] Grotius, 53; Selden, Bk. I, Chap. 3.

[114] After talking about "The utmost extent of those most spacious seas" (Bk. II, Chap. 30), and the North Atlantic stretching to Iceland, Greenland, and America (Bk. II, Chap. 2), Selden confesses that he is not sure how matters stand in those regions; Bk. II, Chap. 30.

[115] *Mare Liberum*, 30.

might consent if the problem were dealt with entirely in concrete terms: the right to license fishing, navigation, the taking of gems, and entry and trade, as well as rights to supervise and regulate such free use of territorial waters as was allowed. These rights Grotius might admit, if properly limited. He would be willing to go almost as far as Selden in recognizing the legal value of state practice or custom as the basis of international law.[116] By this path the two writers might draw very near together.

This process of compromise would have been more difficult for Selden than for Grotius. For it was Selden who was the extremist, contrary to the common impression. Grotius, especially if the *De Jure Belli ac Pacis* is included in the discussion, was far more flexible, far more practical, than Selden. His principles could therefore assimilate future developments more readily, and this was bound to make his teachings prevail in the end, even though Selden's evidence and conclusions were more accurate for the past and the immediate present.

Much time might be spent in a study of the views of Grotius and Selden regarding the way in which dominion arises upon an initial condition of communism.[117] Discovery and occupation, including manifestation of intention, seizure, and recognition, are held to be necessary to perfect title.[118] But the two writers do not diverge sufficiently upon these abstract points to justify such a study. Grotius differs from Selden chiefly in denying the susceptibility of the sea to such treatment to start with, and in his exclusion of prescription on similar grounds. The general positions of the two writers, as already described, subsume their views on these special topics.

[116] Especially in the *De Jure:* Bk. I, Chap. 1, §§ 10, 12.
[117] Grotius, 22–30; Selden, Bk. I, Chaps. 4, 6.
[118] Grotius, 11, 25, 28, 39; Selden, Bk. I, Chap. 4.

Likewise, it would be a work of super-erudition to point out all the varieties of errors to be found in the writings of the two men. There is a deal of question-begging,[119] of arguing from personal jurisdiction to territorial jurisdiction directly,[120] from anti-pirate activities to sea dominion,[121] and from the performances of services to the same.[122] It is necessary to leave on the side much error and also much superfluous erudition in order to grasp the sound and essential principles of the *Mare Liberum* and the *Mare Clausum*. That has now been done. To the formation of modern legal theory on the basis of those principles we now turn.

[119] Grotius, 35, 36, 47, 49, 50.
[120] Selden, Bk. I, Chap. 6, Bk. II, Chap. 2.
[121] Same, Bk. I, Chap. 10; Bk. II, Chap. 5.
[122] Same, Bk. I, Chap. 18.

CHAPTER V

THE DISCUSSION OF THE FREEDOM OF THE SEAS SINCE 1650

SINCE the close of the great controversy between Grotius and Selden in the first half of the seventeenth century the discussion of the freedom of the seas and international practice in connection therewith have followed several rather distinct lines of development. It will be our task in this chapter to describe generally those lines of development and the character of the result attained at the outbreak of war in 1914.

In the first place, the bitter personal and national argumentation concerning maritime liberty and maritime dominion has not abated. On the contrary, the degree to which national policies and the patriotic feelings of writers have controlled what has been said concerning the freedom of the seas has probably been greater since 1650 than before that time. With the development of colonial empires and colonial trade in the eighteenth century, with the creation of naval power by increasingly self-conscious national states, and with the increased importance to the national welfare and to private profit from sea-borne trade in recent years, that could hardly be avoided. As a result, however, even the traces of bias in the thoughts of Grotius and Selden, of Freitas and Buroughs and Welwod, seem mild by comparison. A few illustrations of this will serve to make clear the controversial background against which it has been necessary for students to work

out the more stable elements of the problem in the course of the past three centuries.

The conflicting views of 1600–1650 concerning the freedom of the seas came to expression again particularly during the Napoleonic period and during the World War. Barère, a loyal subject of France, writing in 1798, confesses that he is writing without reference to any other books or persons, because, in addition to the fact that he has no opportunity to consult them, his principal object is not to make a scientific statement, but to enthuse his compatriots against the English.[1] Rayneval likewise, writing in Paris in 1811, directs his attention to Lord Liverpool's "Discourse" because "his doctrine is that of the British Government and because it is in direct opposition with the one which I set forth." [2] Of the character of Lord Liverpool's work no more need be said.[3] Barton, an American, resident abroad at the time, dedicates his work to Thomas Jefferson, complains of the condition of the positive law of nations on the subject and reverts to the law of nature to refute the positive law. He regrets to have to attack Britain, for whose people he really has great hopes, but, as for their perfidious Government, he can not do otherwise.[4] The discussions of the subject just preceding and during the recent war were, as is familiar knowledge, pitched in somewhat the same tone.[5] While France has been the object of the

[1] Barère, Postscript.
[2] Rayneval, xxiii.
[3] Lord Liverpool, *Discourse*, Preface.
[4] Barton, Preface.
[5] Not quite, however; the tone of the discussions of the Napoleonic period is more bitter—in this point the recent war was not productive of the worst possible feelings and utterances. Cp. Wehberg, *Beuterecht*. Some of the defenses of British sea rights of recent years have been more violent; cp. Bowles, *Sea Law*

criticism of the advocates of maritime liberty at times since 1600, even as it was Spain and Portugal which were the objects of Grotius' attack, nevertheless, it has been mainly England which, as in Selden's day, has been the object of the diatribes of the critics in modern times. But be it Athens or Rome, Venice or Genoa, Portugal or Spain or France or England, there has always been some nation which has been regarded with passionate hatred as the tyrant of the seas.

Reference was just made to the connection between the development of colonial empires and colonial trade during the seventeenth and eighteenth centuries and the problem of the freedom of the seas. It will be recalled that Grotius was chiefly concerned in the trade to the Indies, that the Dutch were interested, in the seventeenth century, not so much in a right of navigation but in a right of entry or a right to trade.[6] In the sixteenth century freedom of exploration, discovery, and settlement had been at stake, and Britain had been compelled to destroy the Armada (1588) to gain freedom for her navigators. Bacon alleged that "to be master of the sea is an abridgment of monarchy."[7] Now the problem of the freedom of the seas was involved with the mercantilist systems of colonial trade, the monopolies granted to trading companies, and the navigation acts, port discriminations, and so on, characteristic of that period. This constitutes the second striking phase of the discussion after 1650. It was this sort of thing that Sir Walter Raleigh had in mind

and Sea Power, 1913; Hurd, articles in *Fortnightly Review;* and Munro-Butler-Johnstone, *Maritime Rights*, 1876; Muir, *Mare Liberum*, 1917; Murray, *Great Britain's Sea Power*, 1917. For a strong German view see Tecklenborg, *Freiheit des Meeres*, 1879.

[6] Above, 67.

[7] Bacon, *Essays*, XXIX, ¶ 11; Ogilvie, 52, 64–70.

when he said that "whosoever commands the sea commands the trade of the world and whosoever commands the trade commands the riches of the world and consequently the world itself." [8] Later still, however, with the obsolescence of mercantilist policy, the abolition of monopolistic trading companies, navigation acts, and port regulations, the problem of the freedom of the seas was restored to its original purity. Such topics concern us in our study no longer. In point of fact, there never was any doubt that a state might legally regulate at discretion the export and import of goods in both colonial and metropolitan ports, and likewise the use of its ports and harbors. The most extreme supporter of the freedom of the seas would hardly deny the legal right of a state to exclude aliens and alien vessels from its ports, or insist on the opposite. To-day the littoral state has, if not a right of arbitrary exclusion, at least its equivalent in rights of regulation.[9] And the main subject dealt with in navigation acts was the right to trade—or prohibitions upon trading—a matter not properly a part of the question of freedom of navigation at all, any more than the modern problem of access to the sea, a question of frontiers on land, is a part of the question of free seas. Hence, even if they were not entirely obsolete, these measures, which have received so much attention from students of our problem, would seem to deserve less prominence than they have actually received.[10] They are interesting and sensational subjects, but hardly an integral part of the problem of freedom on the seas. They have now ceased to be discussed under that title.

[8] Raleigh, *Works*, Vol. VIII, 325.

[9] Below, 104–105.

[10] Brown, 31–35, 52, 59, 63, 76, 104, 111–133, 144, etc.; Ogilvie, 83, 89, etc.

An examination of the works of Barère, Barton, and Rayneval, on the other hand, would reveal the fact that they were concerned over a matter which received scarcely any attention from either Grotius or Selden, or their contemporaries. That subject was belligerent powers at sea in time of war. For them this, indeed, was the whole problem of the freedom of the seas. The classic problem of the acquisition and exercise of territorial jurisdiction over the sea had almost passed out of discussion and a topic hardly noticed by Selden, and then only in a deprecating manner, and not noticed at all by Grotius, had taken its place. This constitutes a third line of development to be noted for the modern period. The classic problem of maritime territorial jurisdiction did not disappear entirely, of course, and in time of peace it was still the main question of maritime law, but it was supplemented, and, in time of war—which meant a good part of the time—overshadowed, by its younger rival. Just when did this result come about and for what reasons?

If we turn to the writings of Bynkershoek we shall discover that as late as the first half of the eighteenth century the problems arising out of belligerent action at sea were kept distinct from the peculiar problem of maritime dominion proper. In 1703 Bynkershoek published a dissertation entitled *De Dominio Maris*. It deals almost exclusively with the problem of the inclusion of maritime territory within the national domain. What Bynkershoek has to say on this topic we shall notice later. The significant thing for us here is that he reserved the question of belligerent rights at sea for treatment elsewhere—or, rather, that he omitted to treat of those rights under that title [11] and did deal with them elsewhere—namely in

[11] In the *Dissertatio* Bynkershoek comes nearest to this problem in treating captures in neutral waters.

his *Quaestiones Juris Publici,* of 1737. In the latter work he dealt in detail with questions of blockade, contraband, enemy property on neutral vessels and neutral property on enemy vessels, and all other aspects of neutral rights in trade at sea.[12] The importance of these latter topics had increased greatly with the growth of colonial trade, the trade in provisions and supplies in general, including military supplies, since 1650, and with the development of armed vessels and permanent naval forces. But the new problems were not yet connected in theory with the classic problem of maritime rights.

If we run through the works dealing with maritime law published in the third and fourth quarters of the same century we find that for some time after the appearance of Bynkershoek's volumes matters remained the same. There was a full discussion of neutral rights by Vattel, for example, but not in connection with or under the title of, the freedom of the seas.[13] During the period of the American Revolution and the Armed Neutrality of 1780 it was the same.[14] Down to the first wars growing out of the French Revolution, however acute the question of belligerent powers at sea, the accusation of attempted maritime domination was not raised in formal terms.

It was in the middle of the last decade of the eighteenth century, more particularly in and around the year 1795 that the opposition to certain belligerent rights or practices assumed the principle of freedom of the seas as its ideal. This came about in several ways. For one thing, the law of nations had become less academic and specu-

[12] Bynkershoek, *Quaestiones,* Bk. I, Chaps. 9–14.

[13] Vattel, Bk. III, Chap. 7, §§ 111–117.

[14] Galiani, *De' Doveri de' Principi Neutrali,* 1782; Lampredi, *De Commercio dei Popoli Neutrali,* 1788. The latter discussed the classic problem in his *Jus Publici* in 1776–1778.

lative and had come to be more positive in tone, very closely allied with state practice, and the most prominent element in current state practice concerning the sea and its use was now belligerent activity at sea. Neutrality and the right to remain neutral and to continue commercial activities with all belligerents in time of war was receiving increased recognition as a general principle. Further, that power which had traditionally assumed a very pronounced attitude upon the question of territorial sea dominion, Britain, was now very prominent in the maintenance of colonial commercial monopolies and, more important, belligerent rights at sea. It was therefore very easy for the French to identify their struggle against British sea-power with the historical struggle for the freedom of the seas. Hence Barère's work of 1798 and the whole volume of writing and argumentation under the same heading in the succeeding decade.[15]

Since that time the later form of the problem has well-nigh replaced the classic form. The Americans, in their campaign against both British and French belligerent practices in 1795–1815, adopted the time-honored slogan as their own.[16] What is more, they undertook a campaign for the opening of straits and rivers to free international navigation quite in line with the historic struggle to which Grotius had given his support.[17] This further helped to join the two branches of the subject together. But the very success which attended American efforts in this direction, and the gradual destruction of

[15] De la Grave, *Tocsin*, 1801; Champagne, *La Mer Libre*, 1803; Dubroca, *Memoires*, 1803; Gallet, *Examen*, 1803; Neufchateau, *Tableau*, 1804; Monthrion, *Prépondérance*, 1806; Weiler, *Que Demendra*, 1806; etc. For full titles see Appendix B, below.

[16] Barton, *Freedom of Navigation*, 1802.

[17] Moore, *Principles*, 130–134.

extensive claims to territorial jurisdiction over the sea which came about on all sides in the nineteenth century, together with the continuing difficulty of combatting extravagant belligerent practices at sea—a task not yet successfully completed—left the latter phase of the subject in possession of the chief interest and attention of all peoples. To such an extent has this been true that one recent student of the problem refers to the freedom of the seas in one place as, "in other words, the abolition of belligerent rights afloat," and, in another, as "the high-water mark of what may be called the Hague school." [18]

The gradual destruction of the more extensive claims to territorial jurisdiction over the sea, just mentioned, constitutes a fourth important line of development to be noted in the history of the discussion since 1650. While efforts were being made to restrict the exercise of the right of blockade, the right to declare commodities of all sorts contraband of war, the right to visit and search merchant vessels in time of war to detect offenses against belligerent rights and interests, and even in time of peace to detect activities which various states claimed a right to prevent, the campaign to restrict as narrowly as possible the scope of territorial waters was continued. In a sense this campaign was not so much a deliberate denial of claims still maintained with all their mediævel seriousness, but a sloughing off of claims which could not be taken seriously by even their authors in a day when abstract theory and metaphysics yielded ground increasingly to considerations of practice, utility, and effectiveness.

In this movement the suggested distinction between inner and outer seas, accepted, even if not actually invented, by Grotius, formed the starting point. Holding

[18] Corbett, 3, 4; for the full significance of the latter reference see, below, Chap. 9.

with Grotius—and disagreeing with Selden—that the two types of sea-territory differed in nature and in the treatment which was properly to be applied to them, and that the outer sea must be left free from the territorial jurisdiction of any state, students of the problem undertook a twofold task in completion of this work. On one hand, an effort was made to define, and to define as narrowly as possible, consistently with the principles involved, the scope of territorial waters. On the other hand, they attempted to define, again as narrowly as could properly be done, the measure of state authority over even such territorial waters. Starting from the Grotian ideal, the attempt was made to counteract the type of state practice so fully exhibited by Selden, with the object of attaining an equitable and a convenient compromise for all concerned. The effort was made to reconcile the necessities of national defense and the interests of national prosperity with the desirability of free international communication so as to satisfy all legitimate demands.

This work went forward much more rapidly than the work of combatting the exercise of belligerent rights at sea. The reasons for the special difficulty of the latter task have already been suggested. In addition, the former task was an old one, and considerable beginnings had already been made in that direction in Grotius' time.[19] Moreover, the extravagance of many of the maritime claims put forward in the early seventeenth century, such as those described by Selden, produced a reaction unfavorable to the very cause which Selden had adopted and supported so vigorously. Not only did the extravagances of its friends lay the doctrine of maritime dominion open to ridicule, but they also warned nations what serious

[19] Fulton, 539–541.

inconveniences would flow from acquiescence in such a doctrine. The expense of maintaining such claims by naval force was great and the rewards negligible.[20] And, finally,—perhaps most decisive of all,—no such apparently vital interests, no such acute and critical national desires, were at stake here as were involved in the question of maritime belligerent rights; war rights were defined with a passion not aroused by problems of territorial jurisdiction in time of peace. The British maintained as late as 1805 a claim to have foreign ships strike their topsails (the vail) in British seas, a right first put forward in 1200 by John, enforced against royal personages at times, embodied in treaties such as the Anglo-Dutch treaty of 1653, repeated by William III (1691), and only abandoned in 1806, the year after Trofalgar had made Britain so supreme that she could waive even empty forms.[21] But, although a number of seas had to be regarded as closed seas as late as the end of the eighteenth century, by the scholar Martens, since the middle of the nineteenth century, when the Baltic and Black Seas were finally opened, no claims to a *mare clausum* have been seriously put forward.[22]

[20] Ogilvie, 100–101.

[21] Twiss, Vol. II, 129; Paston Letters, Vol. II, 104; Raleigh, *Works*, Vol. VIII, 327; Ogilvie, 78; Schomberg, 48.

[22] Martens, *Précis*, § 42. Sweden and Denmark attempted in 1907 to reopen the case of the Baltic, which the Baltic states had attempted to close at various times in the past (1658, 1780, 1794), but to no effect; Westlake, Vol. I, 204. The action of 1780 declared the Baltic to be "a closed sea, and must be regarded as such by its local position, in which all nations may navigate in peace and enjoy the advantages of perfect tranquillity," but in which no hostilities might be conducted; decree in Martens, *Receuil*, Vol. III, 175. In 1918 the Baltic states thought of reviving the same program—with little effect; *New York Evening Post*, 31 October, 1918, page 7. On the Black Sea see, below, 213.

So rapidly did scientific thought, at least, move in this direction that by 1703 the fundamental principle upon which the solution was to be finally based had been laid down by Bynkershoek, the principle, namely, of effective occupation. In a sense, that principle had been enunciated by Grotius and by jurists on whom he relied, and the necessity for such occupation had been admitted even by Selden. But Selden had been willing to permit occupation by naval forces, which would have opened the door to unlimited claims, and unlimited abuses, and Grotius, in view of his desire to deny maritime dominion as far as possible, did not, naturally, spend much time in explaining even such dominion as he would permit. Bynkershoek, starting from Grotius' insistence upon control from the shore, held that the dominion of a nation over the adjacent sea extends out as far as the range of common shot.[23] To this day Bynkershoek's principle exercises its influence on the law of nations in this regard, Galiani's suggestion of three miles, as the range of coast defense guns, and thus the concrete translation of Bynkershoek's principle, ridiculously low as it is to-day, being still retained as the standard in the absence of special claims to wider territorial waters.[24]

The task of defining the degree of authority exercised by a state over such waters as are admitted to lie within its jurisdiction has been more difficult. The existence of old claims and the possession of a *de facto* power of control, the complexity and—in a certain sense—the vagueness of the question have made the definition of state

[23] *De Dominiio Maris*, Chap. 2.

[24] On the gradual adoption of the principle of effective control, or gun-range, as a matter of juridical science, its adoption in official interstate practice, and disputes concerning the adoption of three miles as an embodiment of that principle see Fulton, 537–603 and 650–692, especially 558, 563, 573.

authority in territorial waters peculiarly difficult. Until this day there are some doubts concerning the exact measure of authority enjoyed by a state over its territorial waters. But such results as have been attained have been based upon the distinction between dominion and jurisdiction first clearly set forth by Gentilis. Denying dominion or complete territorial sovereignty entirely, the students of the problem have confined their attention to an attempt to define a suitable degree of jurisdiction to be exercised over the sea or certain portions thereof. To this development of scientific thought the states have agreed.

It is unnecessary to add that the question of piracy, so important in an earlier age, did not entirely vanish after 1650. Indeed, the Barbary states rose to the pretension of levying tolls or tribute on traffic in the western Mediterranean and merely holding the threat of piracy in reserve as a sanction for their demands, until the United States compelled them to abandon their claims in the beginning of the nineteenth century. But the pirate was gradually disappearing, and this also contributed to enhance the importance of the question of belligerent rights.

The materials available for a study of the development of the problem since the seventeenth century are very voluminous.

During the course of the seventeenth century itself there appeared a large number of pamphlets and treatises similar to those of Grotius and Selden.[25] Most of these were highly polemical,[26] but taken in the mass they pre-

[25] Lercke, *Oratio de Mare Libero*, 1637; Gothofredis, *De Dominio Maris*, 1637; Boecler, *De Maris Dominio*, 1656; Leikherr, *Dominii Maris Descriptio*, 1683.

[26] Graswinckel, *Maris Liberi Vindicatio adversus P. B. Burgum*, 1652, and *M. L. Vindicatio adversus W. Welwodum*, 1653.

sent a thorough analysis of the classical problem of maritime dominion. Many of these works consist merely of defenses of certain specific national claims.[27] But by the end of the century a more detached and scientific attitude had been attained, until with Bynkershoek's work, *De Dominio Maris,* we reach a truly scientific study of the whole question.[28] All of these monographs of the seventeenth century appear ignorant of the problem of belligerent rights at sea, and speak as though the older form of the question were still in active discussion.

A second body of material is to be found in the general treatises on maritime law which began to appear in the later eighteenth century and multiplied more rapidly in the succeeding decades.[29] Those volumes—a large proportion of the whole—which were composed by French scholars betrayed the influence of the French attitude on the question of belligerent rights at sea as formed during the Napoleonic period; indeed, some of these writers were polemical in precisely the manner of the pamphleteers. On the other hand, by reason of the fact that they pretend to deal with the whole field of maritime law, these writers are led to synthesize the classic problem of sea dominion with the newer problem of war at sea.

As might be expected, many works of the class just described deal in part with specific topics only remotely

[27] Mattheacius, *De Jure Venetorum;* Freitas, *De Justo Imperio Lusitanorum.*

[28] Interrupted later by such works as appeared at the time of the Napoleonic and American Revolutionary wars. Recently certain attempts at scientific treatment have again been made: Castel, *Liberté des Mers,* 1900; With, *Freiheit des Meeres,* 1913.

[29] Azuni, *Droit Maritime de l'Europe,* 1797; Ortolan, *Regles Internationales et Diplomatie de la Mer,* 1845; Hautefeuille, *Histoire du Droit Maritime Internationale,* 1858; Cauchy, *Le Droit Internationale Maritime,* 1862; Perels, *Das Internationale Öffentlichen Seerecht,* 1882.

related to the freedom of the seas, such as the law of jettison, collision, and salvage. Furthermore, even when the law of contraband, for example, is under discussion, the writers do not always deal with the specific subject at hand in the name of the freedom of the sea. For this there are two reasons. Not all writers on maritime law are preoccupied with this concept, not all are even impressed with its value. In the second place, belligerent rights have never, in recent years, been claimed by national states in the name of sea dominion, although, as we have seen, there was some tendency to do so in the earlier period. However, even if they are not claimed in the name of sea dominion, the attempt to claim or define belligerent rights invariably results in a reverse definition of maritime freedom because the latter is the result of the absence or non-exercise of the former. Just so it had made little difference whether a pamphleteer of other years discussed the freedom of the sea or dominion of the sea; the line to be drawn separated one from the other as the water mark separates sea and land.[30]

A third body of material is to be found in the treatises on general international law, maritime, territorial, diplomatic, and so on.[31] Usually written by jurists who were not specialists in maritime law, and devoting only a portion of their pages to the question, these treatises are therefore far less valuable to us here than even the texts

[30] Thus Lercke and Boecler supported the thesis of a free sea, Gothofredus and Leikherr denied it, in spite of the titles of their works (as given in Appendix B, below).

[31] Pufendorff, *De Jure Naturae et Gentium*, 1672; Textor, *Synopsis Juris Gentium*, 1680; Bynkershoek, *Quaestiones Juris Publici*, 1737; Vattel, *Droit des Gens*, 1758; De Martens, *Précis du Droit des Gens*, 1788; Wheaton, *Elements*, 1836, and *History*, 1845; Hall, *Treatise*, 1880; Bonfils, *Manuel*, 1894; Walker, *History*, 1899.

dealing with the whole field of maritime law. In partial compensation for this it must be said that the general text writers preserve a more detached and unbiased attitude on the problem of the freedom of the seas than their specialist colleagues. Such general treatises have multiplied very rapidly since 1875.

Perhaps special mention may properly be made also of certain other types of treatises on subdivisions of the general field of international law outside of maritime law proper. Such are the works dealing with the law of war as such, the law of naval war alone, or the law of neutrality. The first type of text resembles the treatise on general international law in its treatment of our problem.[32] The second is likely to be partial toward the scope of belligerent rights at sea, being written frequently by those closely connected with naval affairs.[33] The last type of work, composed by scholars particularly interested in neutral rights, ordinarily leans in the opposite direction.[34]

It would be unprofitable to attempt to trace in detail the discussion concerning the freedom of the seas carried forward by all of these writers individually, just as it was deemed to be unprofitable to follow in detail all of the argumentation of Grotius and Selden. Apart from the large element of national and political prejudice found in their works, and the normal amount of ignorance, misinformation, and errors of judgment present in their writings, these numerous scholars were, in effect, coöperating in the production of a final result which alone has significance for us to-day. The main outlines of the

[32] Pillet, *Lois Actuelles de la Guerre*, 1901.

[33] Dupuis, *Droit de Guerre Maritime*, 1911.

[34] Hautefeuille, *Droits et Devoirs des Nations Neutres*, 1856; Gessner, *Droit des Neutres sur Mer*, 1876; Kleen, *Lois et Usages de la Neutralité*, 1898.

paths by which that result was obtained have already been described.

In addition to the body of scientific writing upon this question there came into being a vast amount of recorded state practice, diplomatic correspondence, treaties, judicial decisions, and the like, containing much material bearing on the problem under examination. Here also, however, there appear compelling reasons for refusing to examine that material in detail. For one thing the writings of private jurists have been based upon, and have largely summed up in themselves, these very materials. Where this has not been done, it is because national practice and treaty agreements consist too largely of meaningless claims and counterclaims, concessions and bargains in one direction or another, dictated by temporary considerations of national advantage or power.[35] Treaties providing for one solution of a given aspect of the general problem have been made, reversed, made again, and again reversed, as the wheel of belligerent fortune turned up or down in favor of maritime and continental states, until it has often appeared that there are no considerations of general international utility involved at all, but merely considerations of national power and advantage. For some three centuries the whole matter has been in process. Not till after the middle of the nineteenth century was a beginning made on the task of securing an agreed code of maritime international law, and not until the opening years of the twentieth century were any pretentious results achieved. To those results we shall devote our attention in the next three chapters.

[35] Quigley, 7–29.

Part II

MARITIME INTERNATIONAL LAW DEFINING THE FREEDOM OF THE SEAS

CHAPTER VI

THE LAW OF TERRITORIAL WATERS

As a result of scientific discussions by private jurists, the practices of the various states of Europe and, later, of the world at large, during the preceding five or six centuries, there had been developed, by the opening of the present century, a body of international law which defined that recognized measure of national and individual liberty of action upon the oceans and other navigable waters of the world in peace and war which we have designated as the freedom of the seas. More freedom, a more nearly complete freedom, an ideal freedom, might, perhaps, have been recognized in place of what actually was recognized; likewise, a more restricted degree of freedom, a greater degree of national authority over and upon the sea, might have been recognized. For the student of the law of nations, however, what had been said or hoped or claimed concerning the proper extent of maritime liberty is now to be left behind, and an attempt made to state the extent of freedom actually accorded by generally accepted international law, first as regards territorial jurisdiction over the sea, second as regards belligerent rights at sea, and finally as regards piracy, the slave trade and kindred topics.

In forming our conclusions here we must accept as tests the rules relating to the formation of international law in general. Only official state practice and consent are to be relied upon as foundations for international law, and

only such general practice or consent as will raise the action observed above the category of individual national policy. And in detecting this official international agreement only treaties and other reliable records of general and persistent practice can be accepted as infallible guides. At the same time, of course, logical inferences from explicit consent and practice, unofficial records of state activities, and expressions given to general international agreement by the decisions of individual national courts may be accepted because of their foundations, even though by themselves they carry no international authority.[1]

The high sea, the open ocean, is the home, *par excellence,* of the freedom of the seas.[2] No nation may exercise any territorial jurisdiction over the high sea, include the high sea within its territorial domains, or apply to the high sea or to alien vessels or persons or property thereon any authority as applied within and upon its land area, either by way of legislative, executive and administrative, or judicial action.

Each nation may, on the other hand, exercise authority over its own nationals and their property in vessels flying its own flag upon the high sea under a rule derived from the foregoing principle; in the absence of territorial jurisdiction on the high seas each nation may act directly upon the vessels which fly its own flag. All persons—and property—on board such vessels are to be accounted as within the territory of the flag state, the state, that is, whose flag is flown on the vessel in question.

[1] See, below, Appendix C, Notes on Documentation, § 3, for explanation of citations in this and the following two Chapters.

[2] On the status of the high sea, of vessels and persons on the high sea, their activities, and jurisdiction over them, including visit and search in time of peace, see: Hyde, §§ 227, 229, 237; Hall, §§ 40, 76–79; Bonfils, Nos. 572–578, 581, 583–593, 597–609; Liszt, §§ 9, VI; and 26; De Louter, § 21.

All nations are free to utilize this portion of the sea both in peace and war, for all the legitimate activities of their public vessels, including vessels of war and all other vessels owned and controlled, or merely controlled, by the state. All states are entitled to claim for their nationals and their nationals are entitled to claim from other states, in so far as they are in a position to deal with other states directly, as in the courts of those states, the right to utilize the high seas with their private vessels for any legitimate purpose, such as travel, fishing, exploration, commercial transportation, or the taking of gems, sponges, or other substances from the sea, except in so far as these rights have been surrendered by treaty agreements. What purposes or practices are not legitimate, either in an absolute or in a relative sense, for public and for private vessels on the high seas in peace or in war are defined by the law relating to neutral and belligerent rights and duties, piracy, navigation, and the slave-trade, to be reviewed later.

As a corollary of the foregoing principle, and apart from the application of prohibitions regarding piracy and the slave-trade, no nation may, in time of peace, through its public vessels, halt, visit, or search public or private vessels flying the flag of any other nation, nor, indeed, of right demand any recognition from them whatever, upon the open sea. Even where an alien vessel, public or private, is guilty of unlawful acts at sea in time of peace, the remedy must, as a rule, be sought by the injured state through the channels of diplomacy and not by action directly upon the vessel. For general convenience mutual rights of visit and inspection, of arrest and prosecution, may be established by treaty agreements in certain circumstances, but only by such agreements can such rights exist. Finally,—again excepting the mat-

ters of piracy and the slave trade—no nation may, through its public vessels, exact any proof of the nationality or the public or private character of any vessel upon the high sea in time of peace. What actions of this sort may be taken in time of war will be described later.

To these general principles there are to be noted two exceptions which, because of the circumstances under which they have been established, confirm the general principle for all ordinary situations. These exceptions relate to hovering and to hot pursuit.[3]

It is recognized that a littoral state may exercise in the open sea adjacent to its territorial waters, a certain limited degree of authority, inasmuch as this is necessary for the effective enforcement of its national laws relating to revenue, quarantine, and other similar matters. Alien private vessels entering the extra-marginal sea, if that term may be so used, or hovering about therein, and bound for ports of the littoral state, or giving evidence of intention to enter some such port or to make contact with the shore, may be at least boarded by public officials of the littoral state for the purpose of inspection of papers and also of vessel, passengers, and cargo, to detect possible violations of local laws. What would constitute sufficient evidence of an intention to enter, whether mere circumstantial behavior—hovering pure and simple—or a declaration upon inquiry, is not settled. Against such hovering by alien merchant vessels not bound for local ports and not indicating an intention to land, or by alien public vessels, on the other hand, the littoral state may legitimately protest through diplomatic chan-

[3] On hovering and hot pursuit see: Institute, 115; Hyde, §§ 235–236; Hall, § 80; Bonfils, Nos. 610–611; Liszt, § 26, III, 1; De Louter, § 21.

nels but not, apparently, demand their withdrawal or act against them.

On the other hand, alien merchant vessels, even though, upon the inspection above referred to, they appear to intend a violation of law, may not be seized outside the marginal belt for anticipated violations of local law, various dicta to the contrary notwithstanding. But, by the same rule, where such a vessel, lying outside the marginal belt, has made contact with the shore by means of her own small-boats, she is held to have constructively entered the marginal belt and is liable to seizure for violation of local law. To hold otherwise would be to defeat the practical ends in view and to misinterpret the sense of the principle involved.

Similarly, it is agreed that an alien private vessel which is believed to have violated national revenue or police or other laws while within the territorial belt may be pursued continuously out upon the high sea and there seized —not, however, in foreign territorial waters—and taken back for judicial process according to law. The ground for action here is not, as in the preceding case, that of preventing future, although immediately future, infractions of the law and social injury to the nation, but of punishing a past infraction and injury and thus indirectly preventing future infractions. The pursuit in such cases must be a hot pursuit—immediate and continuous—but may be carried out over any extent of the open sea outside of the territorial waters of other states, including that of the offending vessel.

The net result of these principles is to bring it about that littoral states may act in certain ways for the preservation of their safety and the protection of their laws over an undefined and indefinite stretch of coastal waters. The whole idea of a peculiar and definite marginal sea

tends to be discredited. Real danger to the littoral state or its laws, and actual infractions of those laws, are the tests of the right of the state to act, rather than the scene of that action. It need hardly be added that such action is peculiarly liable to provoke protest from other states and must be undertaken with moderation and caution. It may also be suggested that states will frequently refrain from claiming or exercising these rights on account of political or diplomatic considerations.

There is another right possessed by states for general exercise, which, although not framed in terms of maritime jurisdiction, may in a given case bear upon the high sea and result in a further diminution of the freedom of certain individuals at the time thereon. Any state may take physical action to prevent imminent physical danger such as an invasion, bombardment, or similar action.[4] This is a specific and highly restricted embodiment of the general principle of self-preservation. Such action could be applied to either public or private alien vessels about to attack the safety of the defending state. Such vessels might properly be bombarded, sunk, or captured for adjudication. Whether they should be released or condemned for piracy or as enemy prize in *de facto* hostilities would then depend on the circumstances, as will appear when those matters are discussed.

The definition of the line separating the high seas from territorial waters is the next step to be undertaken in defining the freedom of the sea.[5] It has been admitted from very early times, as we have seen, that every nation

[4] On right of physical self-defense at sea in time of peace see Hyde, §§ 68, 228; Hall, § 86.

[5] On extent of the marginal belt see: Institute, 113–114, 162; Hyde, §§ 141–145; Hall, § 41; Bonfils, Nos. 491–492; Liszt, § 9, V, 1; De Louter, § 21; Crocker, *Marginal Sea*, entire.

may treat as a part of its territorial domain a certain portion of the littoral sea. It has also now been generally agreed that this marginal belt extends to a distance of at least three miles from the low-water mark. Various states have attempted from time to time to claim marginal belts of greater width, in view of the fact that an application of the bare principle of possible effective occupation or control would justify such a claim. And marginal belts of greater width than three miles have been claimed and successfully maintained in certain peculiar geographical areas, as around Ceylon and in the Bay of Cancale. But, keeping in view the countervailing ideal of unimpeded international use of the sea, the nations have not recognized any general alteration of the old rule, while still admitting the possibility of any individual nation securing general consent to a wider belt, whether this has or has not been accomplished in any particular case.[6]

The definition of the degree of authority enjoyed by the littoral state over its marginal belt is still more difficult.[7] That authority is something less than the authority exercised over the landed domain of the nation, for although the littoral state may exercise complete authority over its own vessels, public and private, their cargoes and personnel, found therein, it may not, for example, exclude all aliens therefrom, as may be done on land. Alien vessels, private or public, may enter and navigate the territorial belt at will in time of peace. Other activities, such

[6] On certain efforts of the United States to secure by agreement an extension of her marginal belt to twelve miles—for certain purposes—see *New York Times*, June-September, 1923, especially 24 July and 17 August.

[7] On state authority over marginal waters see: Institute, 114, 162; Hyde, §§ 154, 226; Hall, § 59; Bonfils, Nos. 494, 517–519; Liszt, § 9, V, 2; De Louter, § 21.

as hovering, as above described, or gun-fire in practice or by way of bombardment, if carried on in marginal waters, will bring into operation other rules of law laying the alien vessel open to some action by the littoral state; and in time of war special powers are held by the latter over all vessels within its waters, as will appear later. But, apart from such special circumstances, all nations possess, for their own vessels and those of their nationals, a right of innocent navigation in the territorial waters of one another.

Beyond this right of innocent navigation the littoral state has a complete negative control over the movements and actions of the alien vessel in its waters and the movements and activities of all persons on board so far as those activities take effect outside of the vessel. Restrictions amounting to exclusion may be imposed upon fishing; upon anchorage, and any other use of the sea-bottom; upon the taking of gems or sponges. Regulations may be issued regarding pilotage, the use of certain channels, navigation lights or sounding devices, and the observation of maritime ceremonial, the carriage of dangerous cargoes or passengers affected with certain diseases; and all this apart from any question of dockage or discharge of passengers and cargo. By historical or conventional servitudes the discretion of the littoral state in the control of its marginal waters may be limited, but this is a clear exception to the general principle of absolute control. To such an extent is maritime freedom restricted in territorial waters.

The application of the above principles to certain specific situations leads to still further restriction of maritime liberty. Thus, the internal affairs of a foreign private vessel (freight, discipline, wages, and the treatment of members of the crew) are free from the jurisdiction of

the littoral state, in so far as that state has not imposed upon foreign vessels, as conditions of entry, regulations in this regard, and in so far as they have no effect outside of the walls of the vessel; and the master of the vessel has as complete control over such matters as he would at sea. Nevertheless, the littoral state may assert jurisdiction over the parties to acts actually or potentially affecting the peace and safety of the state or its people, even to the extent of entering and removing from the vessel such parties and proceeding against them according to law. There is no right of asylum on such vessels. The vessel itself may be penalized within reasonable limits for infractions of navigation laws or port rules. Finally, local courts may at their discretion, and in the interests of justice, entertain civil proceedings instigated by persons on board private alien vessels against other persons on board or *in rem* against the vessel itself,[8] even for acts committed while the vessel was at sea.[9]

For foreign public vessels these rules have a more limited application.[10] Such vessels, their equipment, smallboats and rafts, and their crews are immune, while engaged in public duties, to local civil or criminal judicial actions begun by others, although liable on appeal, crossuit, or similar subordinate process, in an action begun by the officers of the vessel herself or by any of her per-

[8] See, below, 110, references on status of alien vessels in ports; the same rules apply here, always excepting the vessel merely passing through the marginal belt.

[9] For discussions concerning the relation of these rules to the enforcement of prohibition in the United States see *New York Times*, in general, for 1922–1923; also the decisive case of *Cunard S.S. Co. v. Mellon*, decided on 30 April, 1923, in —*U. S.*, at—.

[10] On public vessels in foreign waters see Institute, 145–150; Hyde, §§ 250–257; Hall, § 55; Bonfils, Nos. 614–623, 629; Liszt, § 9, VI; De Louter, § 21.

sonnel. This is also true so far as disputes among persons attached to the vessel are concerned, except when such persons are temporarily on shore. In the latter circumstances both individual officers and crew are amenable to local jurisdiction for all acts not done as agents of their state; for violations of local law on shore they may be punished by law and sent on board ship. If they have taken refuge on board their surrender may be demanded. When we return to regulations concerning fishing and navigation, however, it must be held that, while no public vessel is likely to engage in fishing at all or to disregard local rules regarding navigation and quarantine, nevertheless, should such actions be discovered they would warrant the local state in demanding, through diplomatic channels, compliance with the local laws, and, if the immediate safety of the state or its people were at stake, in using direct naval power to prevent the continuance of the practice and compel departure from the territorial waters. Similarly, the preceding rule regarding the immunity of public vessels, while it relieves these vessels entirely from visit and search, and prevents the local state from forcibly removing persons wanted on shore for judicial purposes, does not constitute a right in these vessels to grant asylum to refugees except in cases of fugitives from slavery or political disturbance or mob violence where the immediate preservation of human life is at stake. Even here the refugee must not be allowed to take any further part in events on shore.

None of these rules according to the local state jurisdiction over foreign vessels in territorial waters apply to vessels compelled by stress of weather to enter the same for refuge.[11] The vessel is not subject to penalty

[11] On vessels seeking refuge see: Institute, 145; Hyde, § 224.

for entry without permission, goods and persons on board are exempt from revenue and police jurisdiction and, indeed, from any interference whatever. Needless to say, in order to claim such immunity the emergency must be a *bona fide* emergency and the vessel must leave when the emergency passes. The vessel must, moreover, abstain from any actions which would bring into play other rules of law; that is, no persons or goods may be taken from the vessel, and local navigation laws, at least so far as not inconsistent with the object of securing refuge in the emergency, must be observed.

It should be added that the authorities of the littoral state may demand evidence of the nationality and public or private character of the vessel within its waters. In the former case the flag flown by the ship and the word of the commander are conclusive at the time, although both may be called in question later. In the latter case the ship's papers have similar value as evidence. This question is involved in many difficulties at present, as a result of the extensive practice of state ownership, requisition, and control of erstwhile private merchant vessels, but such a question is not directly a part of the problem of maritime jurisdiction, and may be left aside with this brief treatment.

There is another activity—beyond fishing and navigation—which comes within the purview of maritime states and their powers of jurisdiction. That is the laying of submarine cables.[12] Applying to this matter the principles already set forth, we may conclude that any state, or the citizens of any state, are entitled to lay submarine cables at will upon or under the high sea, while for the laying of cables under territorial waters, as for the land-

[12] On laying of submarine cables see: Hyde, § 211; Bonfils, No. 583.

ing of cables upon the shore, the consent of the littoral state must be obtained. That consent may be given upon conditions stipulated, and in such case the enforcement of those conditions—regarding the operation of the cable, for example,—is a right of the consenting state. The forcible seizure or destruction of cables landed or operated in default or defiance of the consent of the littoral state would be justified. The protection of those portions of the cables which rest under the high sea lies, doubtless, within the power of that state which owns, or whose citizens own, the cable itself.

Within the marginal belt, and forming part of it, are all bays and gulfs, and these are legally included in the territorial waters of the state.[13] In determining what bays are to be treated as territorial, the principle of effective occupation has been applied more freely than in the definition of the marginal belt proper, inasmuch as the object of international use of the open sea is not here involved. As a result, certain bays with mouths of a width greater than six miles are admitted to be capable of being included within national territorial jurisdiction. On the other hand, no common agreement has been reached in general terms as to the maximum width of a bay which may be so included. Each case must be dealt with in its own name, with due attention to prescriptive rights acquired by claims long maintained and accepted by other states. So far as any rule has been adopted it may be stated thus: such bays as, by their relative concavity, in relation to the shores, are geometrically or geographically a part of the continent rather than of the open sea, and are

[13] On status of gulfs, bays, and ports and alien merchant vessels therein see: Institute, 114, 144; Hyde, §§ 146–148, 185, 187, 221–223, 225; Hall, § 58; Bonfils, Nos. 516, 624–628; Liszt, § 9, V, 3; De Louter, § 21.

therefore capable of effective control—perhaps not entirely by coast defenses in this case—are properly treated as territorial in character. Such are the Delaware and Chesapeake bays in the United States and Conception Bay in Newfoundland; other cases must be settled by examining the state of the national claims and general international consent in each specific instance. In all such cases the marginal belt proper is to be measured from a line drawn from headland to headland.

In exercising jurisdiction over such bays as have just been described the littoral state is possessed of all powers exercised over the marginal belt, and is not limited by the right of innocent navigation as applied to the latter, there being no substantial ground for this right in such cases, nor any general practice in support thereof. But a limitation somewhat similar in character is to be found in the right of alien vessels to enter such bays for refuge in stress of weather. Foreign vessels of war may, in addition, be admitted by comity for the purpose of awaiting orders or overhauling ship, but this is not a matter of law. Finally, alien vessels accorded access to the national ports are entitled to use for that purpose also the bays where ports are located.

Access to the national ports may not now be denied to alien private vessels as a general principle. But a state may, within this limit, regulate the time and mode of access to its ports, specify which ports are open to foreign vessels, close all or certain ports under special temporary conditions, and exclude foreign war vessels entirely. In the absence of such explicit exclusion public vessels have a right of access, but no right of exploration, maneuver, or target practice. They may be required to give notice of arrival, prospective length of stay, or other data for the information of port authorities. If any existing port

regulations are disregarded the littoral state may use physical force to compel compliance or withdrawal. A foreign public vessel, and, indeed, any foreign vessel, may, for adequate cause, be required and compelled to leave on reasonable notice. These general rules have, by a process of reciprocal extension of privileges, been made to supplant the many unequal discriminations of an earlier day regarding entry into ports.

As a matter of precaution it should be noted that, while in earlier times the right of aliens to enter, travel, and sojourn in a given country, and the right to trade with merchants in that country, were linked up in discussion with the right of navigation, this is no longer the case. The right of access to ports does not include a right on the part of aliens to land or trade.[14] The littoral nation, like a nation with no seacoast, has an absolute right to regulate and prohibit the entrance of aliens and the export or import of goods.

Jurisdiction over straits is governed by rules reflecting both the principles applicable to the marginal belt and those applicable to bays.[15] Straits and sounds entirely within the territory of one state, such as Long Island Sound, are part of the territorial waters of that state, if not over six miles in width, and even if they are over six miles in width but are entered by openings less than six miles in width. Straits separating two states are divided between the two states for jurisdiction, provided they are not more than six miles wide. In specific cases, however, straits of greater width may be so treated,

[14] On right of entrance and trade see: Institute, 89, 104; Hyde, § 59; Hall, § 63; Bonfils, No. 441; Liszt, § 25.

[15] On straits see: Institutes: 115; Hyde, §§ 150, 155–158; Hall, § 41(2), 42; Bonfils, Nos. 506–511; Liszt, § 26, II, 3 and 4; De Louter, § 21.

as may certain bays where circumstances dictate such action. Where the width of the strait reaches such a point that the body of water appears rather to be an open sea, however, the territorial jurisdiction of each littoral state is restricted to the usual three-mile limit, and this rule applies also to bodies of water not properly to be considered straits in spite of their relation to connecting bodies of water entirely within the territory of one state, such as the St. George's Channel and the Irish Sea. Just when that point is reached depends not so much on any general rule or standard width, but, as in the case of bays, upon local geographical conditions and established practice in regard to that particular body of water. In all cases of straits, however, the right of innocent navigation, under regulation by the littoral state or states, applies, the rule here according with the rule in the case of the marginal belt rather than the rule in the case of bays, since the strait serves as a connecting link between two open seas; in this respect the Danish Sounds are to be distinguished from Delaware Bay.

Closely akin to the international strait is the international river, the navigable river bordered by, or which flows through, two or more states.[16]

The former is open to navigation by both states and is divided between the two riparian states, for the purposes of jurisdiction, by the middle of the most commonly used channel of the stream at the time the river becomes the common boundary. Of course, this line may shift with gradual and natural changes in the location of the channel. On the other hand, if the river or its main channel change their location by suddenly shifting to a

[16] On international rivers see: Institute, 78–83, 168–170; Hyde, §§ 137–140, 159–184; Hall, § 39; Bonfils, Nos. 520–530; Liszt, §§ 9, IV; 27, 1, II, III, V; De Louter, § 23.

new bed, either from artificial or natural causes,—although it should be noted that intentional artificial diversions by interested parties are unlawful—the old line of jurisdiction holds, even though it rest no longer in the main channel, or, indeed, in the river at all. We are here dealing not merely with the law of river jurisdiction but with the larger problem of state boundaries in general. The rules governing the latter subject hold that, where a river flowing between two states is not navigable, the line of jurisdiction lies in the middle of the stream. Finally, it may happen that a river which flows between two states is retained, because of, or by means of, special historical or conventional legal arrangements, within the territory of one state.

More frequently a river lies so that both its banks are within the territory of one state. And frequently also such a river flows through the territories of two or more states. In all such cases the territorial jurisdiction over the river lies in the riparian state at each point on the river. In the exercise of territorial jurisdiction over such rivers, the principal international consideration, as in the case of straits, is found in the serviceableness of the river as a channel of international communication. Rivers entirely within the territory of one state may, however, be entirely closed by that state to foreign navigation, or opened on conditions set by the state. Even where the river is an international stream in any of the classes described above the riparian state possesses, apparently, the right of exclusion, including the right to impose tolls and police regulations at will, as against co-riparian and other foreign states, in respect to those sections of the river exclusively within its boundaries. Rights of navigation can only be securely obtained by special treaty agreements, although by such agreements many inter-

national rivers have in fact been opened to general international use, and it might even now be held that navigation is permitted in the absence of express prohibitions. This state of affairs, so far as the general law is concerned, is attributable to national jealousy regarding the sanctity of territorial jurisdiction, variations in geographical conditions making the formulation of general principles difficult, and to the demonstrated possibility of attaining the desired results by treaty arrangements. The ultimate stage of such arrangements is found in the internationalization of international rivers by conventions among the principal interested powers, a mode of treatment available also for bays, straits, or canals in similar situations.

Like purely national rivers, inland lakes or seas are entirely under the jurisdiction of the state within whose territory they lie, and may be closed to alien use even though they connect, by rivers or other water passages, with the sea.[17] Indeed, even more than national rivers, such lakes, not connecting with the sea or touching any other state, form no part of the problem of the freedom of the sea. Where such lakes lie within the territories of two or more states, the situation becomes more complicated. By implication from principle, the general law would hold that such lakes or inland seas, equally navigable in all parts, would fall, in portions calculated by the lake frontage of the riparian states, within the territorial domains of those states, out to the middle of the lake, saving to all states a right of innocent navigation for purposes of access. This would seem to demand for its satisfactory application an agreement among the riparian states locating boundary

[17] On closed seas and lakes see: Hyde, §§ 149, 186; Bonfils, Nos. 495–505, Liszt, § 9, IV, 1c and 2; De Louter, § 21.

lines and recognizing mutual and alien rights to navigation. In taking this step, however, the riparian states might exclude alien navigation entirely.

Canals are ordinarily in the position of landlocked seas and, like them, form no part of the problem of the freedom of the sea.[18] They may connect international rivers, however, or international seas; they may, in other words, be essentially international or interoceanic canals. Even in such cases they invariably lie, as do international rivers which are not boundary rivers, entirely within single states at all points. Moreover, they are not natural highways, but artificial channels created at some expense by the riparian state. For all these reasons they are, by general law, entirely within the absolute control of that state; by treaty agreements or by practice that state may open these canals to use by other states under any one or more conditions. The arrangements made may amount to a general internationalization of the use of the canal, while reserving some local jurisdiction to the littoral state. The Kiel, Suez, and Panama canals are in such a position by special arrangements.

Such is the outcome of the long train of discussion concerning sea dominion. It will appear that the result approximates the views held by Grotius more nearly than those held by Selden.

It will also appear that, alongside of the general law, supplementing it, and in time amending it, stand a large number of special agreements, extending to individual states or to all states, generally or under certain conditions, rights of use in ports, rivers, and canals, which could not be claimed by general law. Such are the provisions of the peace treaties of 1919–1920, particularly the treaty of

[18] On canals see: Hyde, §§ 197–198; Hall, § 89a; Bonfils, Nos. 511–515; Liszt, § 27, IV; De Louter, § 23.

Versailles, relating to rivers and canals in Central Europe.[19] The existing freedom of the sea is to be measured by reference to both systems of law, the customary and the conventional. But the special privileges granted by treaty may be withdrawn or modified and the measure of maritime liberty which can be claimed by general law is the only thing that can be counted on with security over any long period of time. Whether existing conventional privileges in the navigation of international rivers and canals will eventually crystallize into permanent privileges time alone can tell. Whether it is desirable that they should is an open question. To these political aspects of the matter we will turn later.

We now turn to the law of naval war as it bears on the freedom of the sea.

[19] Treaty of Versailles, Arts. 321–364.

CHAPTER VII

THE LAW OF WAR AT SEA

A STATEMENT of the law covering the other great branch of the problem of the freedom of the sea is more difficult. For we have to deal here with a branch of international law with regard to the details of which there is considerable dispute among the students of the subject. And yet only a complete statement of the rights and duties of belligerent and neutral states in their maritime relations would fully define the recognized scope of the freedom of the seas in time of war.

We may leave aside, with only brief discussion, a number of actions which may legally be taken by individual nations, and which have the effect of abridging complete liberty of action at sea, known as measures of forcible redress short of war.[1] In certain circumstances a nation whose rights have been injured may resort to the seizure of the vessels of the offending nation or its citizens when found on the high seas or in the territorial waters of either party, by way of reprisal or retorsion for illegal acts committed by the other. Similarly, an embargo may be imposed for a longer or shorter period on the vessels of the offending state within the ports of the injured nation, apart from any embargo in preparation for forced requisition or in contemplation of war, both of which will be

[1] On forcible measures short of war, especially maritime action, see: Institute, 144, 153–154; Hyde, §§ 588–591, 593–594; Hall, § 120; Bonfils, Nos. 971–985; Liszt, § 38, III, 2 and 3; De Louter, § 41.

discussed later. In this and in other cases of reprisal or retorsion the action taken is admitted to be illegal by itself and only justifiable in reprisal for other illegal action. Or, on the other hand, the action taken may not be contrary to strict law regarding maritime liberty but merely abridge the freedom ordinarily allowed as a matter of courtesy. For these reasons the subject of reprisals has a less direct and decisive bearing on the legally recognized freedom of the sea. Moreover, such actions as, taken under the name of reprisals, affect the sea and the activities of foreign nations and alien individuals thereon do so only accidentally, for reprisals may take place on land as well as at sea. And the only rules of maritime law which have any direct bearing on the subject are those which have already been described, and which operate negatively in such cases to forbid acts which may on that account only be justified under the term reprisals or retorsion.

The net results may best be studied in the practice of pacific blockade.[2] For the purpose of coercing an offending state into compliance with what it believes to be its just rights and demands a nation may establish a blockade of one or more ports of the former while still maintaining that no state of war exists between them. Unless the blockaded state sees fit to treat the blockade as an act of war or to declare war itself peace will continue. The blockading state is entitled to prevent egress or ingress by the vessels of the blockaded state, seizing and holding for further disposal such vessels if they attempt breach of blockade. That these vessels may be confiscated for the attempted breach of blockade would seem to follow from the general power of reprisal at discretion. The most

2 On pacific blockade see: Institute, 69–70; Hyde, § 592; Hall, § 121; Bonfils, Nos. 986–994; Liszt, § 38, III, 1; De Louter, § 41.

significant aspect of the situation appears in the fact that the ordinary rules according the blockaded state the right to utilize its own territorial waters and to emerge therefrom on to the high seas, the right exclusively to control its own vessels while in or upon those waters, and other similar rights, are overridden by the right of pacific blockade. On the other hand, it is not admitted that the blockading state may interfere with the activities of the vessels of third states, in the absence of that condition of war which is the basis of the consent of those states to permit interference with their vessels by a blockade. To blockade in time of war and other forms of belligerent action in restraint of complete freedom at sea we now turn.

There are, to begin with, two steps which may be taken by states in direct contemplation of the imminent outbreak of war which have the effect of suspending certain of the recognized rules of maritime freedom. A state may at such a time impose impartially upon prospectively neutral vessels within its ports an embargo, in order to destroy or utilize these vessels in great emergency, in exchange for a fair payment for losses incurred and services rendered in transport work when the war has broken out.[3] This is the application of the right of angary to maritime property. Again, an embargo may be imposed upon prospectively enemy vessels at such a time with a view to confiscating such vessels as enemy property at the outbreak of war. Attempts to secure the abolition of this right and the recognition of a right on the part of enemy vessels to a certain period of delay during which to leave the port in which they are found or for which they are bound at the

[3] On embargo in contemplation of war, and angary, see: Institute, 154; Hyde, §§ 594, 633–635; Hall, §§ 122, 278; Bonfils, Nos. 328, 1490; Liszt, §§ 38, III, 2(b), and 24, IV, 2; De Louter, § 50; Crocker, *Angary*.

outbreak of war have failed, and such delays as are granted result merely from voluntary abstention from the employment of the right of embargo and confiscation.

When war has actually broken out a new set of rules and principles governing freedom of action at sea comes into play, almost entirely obliterating the rules in force in time of peace. In time of peace freedom of action on the sea and its arms is the general assumption, and all exceptions must be justified by affirmative proof of consent by the family of nations. In time of war, while this is still true in strict law, the exceptions so recognized are so numerous and important that freedom at sea appears to be most conspicuous by its absence.

The belligerent state is by force of circumstances in position to enjoy most of the freedom of the sea. He may utilize the high sea for the practice of hostilities by his war vessels against the public vessels of the enemy, including attack and bombardment, boarding, capture, or destruction.[4] For the purpose of committing hostilities he may create a force of public vessels not only by building and launching such vessels and purchasing vessels from private builders or owners but also by requisitioning the vessels of citizens or aliens within port at the outbreak of war, as above described, or by taking over by agreement or requisition the vessels of citizens wherever found during war, and converting them, either on the high seas or in his own waters, into public vessels by putting them under the control of a commissioned officer and thus placing them on a par with other public vessels. It may be added that

[4] On maritime hostilities, conversion of merchant vessels and limitations on same, see: Institute, 33, 131–133, 174–195; Hyde, §§ 703–708, 710–712, 736, 740–741, 773, 775, 776–782; Hall, §§ 180–184; Bonfils, Nos. 1268–1280; Liszt, §§ 40, I, VI, and 41, I and III; De Louter, §§ 48, 49.

naval hostilities may be conducted not only upon the high seas, but within the territorial waters of either belligerent. Hostilities may be carried on not only against enemy vessels, but against fortifications, docks, or other public enemy property accessible from the sea, where it is not protected by rules exempting it from attack, as well as for defensive purposes, in all of these connections.

In the conduct of hostilities on the sea belligerents are subject to certain limitations which tend, on one hand, to preserve a sea freedom which would be destroyed by the practice of absolute hostilities, but which tend, on the other, to destroy the sea freedom of the attacking belligerent. The general principles of the law of war forbidding the unnecessary taking of human life, forbidding actions causing unnecessary suffering, forbidding pillage or devastation, and the use of treachery or poison, apply here as in warfare on land. The prohibition upon the bombardment of undefended or unmilitary towns except in certain narrowly defined circumstances, applies to bombardment from the sea as well as to bombardment on land or from the air. But in this case, as well as in the foregoing cases, maritime usage or law is not primarily at issue, and we may leave these exceptions with only such reference to them as has now been made.

When we come to submarine mines and floating mines—automatic contact mines chiefly—the means of attack open to the belligerent are further restricted.[5] This comes about not as a result of general prohibitions applying to land warfare as well as to sea warfare, but as a result of definite efforts to preserve for innocent shippers as large a measure of maritime liberty as possible, even in time of war. A belligerent may lay anchored and controlled

[5] On submarine mines see: Institute, 166–168, 178–179; Hyde, §§ 713–719; Hall, § 185; De Louter, § 49.

mines in any part of the sea except neutral waters, and may freely explode such mines against the public vessels of the enemy; their use against enemy or neutral merchant ships will be discussed, below, in connection with the practice of blockade. All anchored mines must be so constructed as to become harmless when they break from their moorings. Anchored automatic contact mines may also be laid in all parts of the sea outside neutral waters, but only with adequate notice to neutral shipping. Unanchored automatic contact mines may also be sown outside neutral waters provided they are so constructed as to become harmless after an hour's duration. All belligerents are under obligation, at the end of war, to remove, or arrange for the removal of, all anchored mines placed by them during hostilities, as well as all other obstructions which may be placed in navigable channels near enemy ports.

It will be seen that the free exercise of the right to place or sow submarine mines might well produce upon the high sea certain more or less extensive areas practically closed to neutral shipping, in spite of the fact that such action could not be taken by the belligerent directly.[6] As a result of the right to make war and to attack the public vessels of the enemy the belligerent state is freed from any responsibility for the welfare of neutral vessels which come within an area of active hostilities at sea, as during the course of a naval engagement. But he has not been accorded the right to close to neutrals by bare proclamation any area of the sea which he may choose. So far as he seeks to accomplish this object he must do so by means of mine fields sufficient to control, for military purposes, and by way of current military action, the area in question.

[6] On war zones see: Hyde, §§ 720–721.

If this is done, however, there seem to be few limits to the power and right of the belligerent in destroying freedom of navigation on the sea.

When the belligerent attempts to use naval vessels to maintain and establish such closed areas at sea he encounters greater difficulties. He possesses no general right to control the movements of neutral merchant vessels at sea, and no right to capture or sink such vessels apart from certain specific actions on their part. Accordingly, the belligerent must present his action in creating a war zone in the light of a temporary extension of his power over his territorial waters, already described, or in the light of a blockade.

The belligerent may deny to all alien vessels, public and private, that right of innocent navigation in his marginal sea which they may ordinarily possess.[7] He may close his ports and the channels of his navigable waters by obstructions of all sorts—mines, wreckage, and chains,—and only subject to an obligation of removal at the end of war for such obstructions as are placed so as to interfere with rights of navigation possessed by foreign nations. This is a concession to the necessity of the belligerent to preserve his own safety; in point of fact the right is seldom used. Likewise, the belligerent may exercise a certain degree of control over the extramarginal sea for a like object, comparable with the authority exercised by the littoral state in this area for the protection of its revenue and police legislation, extending in the present case even to exclusion in case of necessity. The creation of a war zone at this point by proclamation is not necessarily dependent upon the use of mines, and vessels entering that area may

[7] On denial of innocent navigation in time of war see: Institute, 114, 144, 156; Hyde, § 154; Hall, § 42.

legally be compelled to leave, captured and confiscated as war prize, or destroyed at sight.

Such action may also be taken in other portions of the sea where coaling stations, fleet bases, or even mercantile shipping routes are to be defended. Where the effort is made to establish a closed area on the high sea apart from any defensive operation, however, and as a part of offensive action against the enemy, no right to capture, destroy, or confiscate neutral or enemy merchant vessels can be claimed merely on the ground that they are discovered within the closed area. In order to justify the use of a closed area for offensive purposes in this way the action must be brought within the limits of the law of blockade. To hold otherwise would be to permit blockade by sheer proclamation, enforced not by capture but destruction at sight.

The belligerent may freely establish a blockade of enemy ports and coasts, just as he may lay siege to cities and towns on land.[8] Indeed, maritime blockade grew up, historically, in connection with the practice of siege. Such an action must be notified to neutral states and shippers, and must be undertaken in earnest, by the employment of sufficient forces to render the blockade effective and access to the coast or port dangerous, whatever that may require in the number of vessels, their stations, movements, and reliefs. Access to neutral coasts and ports may not be obstructed.[9] The blockade must be applied impartially to the ships of all nations. Space

[8] On establishment of blockade see: Institute, 15, 52–53, 76, 77, 180; Hyde, §§ 824–842; Hall, §§ 257–266; Bonfils, Nos. 1606–1673; Liszt, § 41, IV; De Louter, § 57.

[9] On continuous voyage as applied in connection with blockade see: Institute, 53; Hyde, §§ 828–832; Hall, §§ 263, 266; Bonfils, Nos. 1666, 1667; Liszt, § 41, IV, 3; De Louter, § 57.

does not permit a statement or discussion of all the rules relating to presumptions of awareness on the part of neutrals, temporary relaxations of blockade, and so on. Suffice it to say, in regard to the latter point, that temporary interruptions due to stress of weather or similar causes do not invalidate the blockade, and that vessels may be permitted to enter or emerge from the blockaded port on grounds of humanity, comity, or special agreement.

It will have been noted that the person most concerned with restrictions on belligerent action in laying mines and establishing a blockade was the neutral shipper. Indeed, freedom of the sea in time of war, while it has some bearing on the rights of belligerents to conduct hostilities against one another, and restrictions upon those rights, is nearly equivalent to the measure of neutral commercial activity permitted by the law. And here is involved not so much physical attack, capture and destruction as inspections, arrests, and penalties—the sort of restrictions on maritime liberty most significant in the eyes of the student of law and government.

The treatment of private enemy vessels may at this point be assimilated to that of private neutral vessels. For the former are not open to bombardment and destruction at sight as are enemy public vessels, but only to a mode of treatment comparable with that applicable to neutral merchant vessels. Neutral public vessels, of course, are immune from all interference from the belligerent so long as they preserve their neutral and public character and do not attempt to assist the enemy by taking part, however remotely, in hostilities, and do not attempt to interfere with the activity of the belligerent in legally attacking the enemy, maintaining blockade, and exercising his normal rights of visit and search, and capture.

Against all private vessels, enemy and neutral, or—at

the time—of unknown nationality, encountered outside of neutral waters, the belligerent possesses a right to hail, halt, board, and examine the vessel, her papers and her cargo. This is called the right of visit and search.[10] The action has for its object the discovery of the true nature of the vessel, her nationality, course, cargo, employment, and any other facts relevant to the treatment to be accorded her by the belligerent. Indeed, visit and search to determine these facts—particularly the nationality of the vessel—is an obligation resting upon the belligerent antecedent to any further action against the vessel. Failure to discharge this obligation may directly or indirectly not only invalidate other or subsequent action against the vessel or her cargo but constitute grounds for damages if further action is attempted against the vessel without due cause, discovered by visit and search.

The right of visit may be exercised only by a belligerent public vessel, after an open indication of her nationality and a summons to the vessel to be visited to lie to. The visiting vessel may then send on board, by means of a small boat, an officer or two and one or two men, to conduct the visit and search. Such officers may carry side-arms but the crew of the small-boat and the non-commissioned members of the boarding party may not be armed. The merchant vessel is under obligation to submit to visit and search and if she does so may not be fired upon at this time. If she refuses to heed the summons and resists visit in any way, even merely by attempting flight, after adequate summons given, she may be compelled by force to submit to the authority of the belligerent, and if in the process she is damaged or destroyed the belligerent is

[10] On visit and search in time of war see: Institute, 15–16, 46–50, 76, 156, 181; Hyde, §§ 724–750; Hall, §§ 270–271, 273; Bonfils, Nos. 582, 590, 1402–1407, 1589–1594; De Louter, § 59.

under no liability for these consequences. On the other hand, it does not affirmatively appear that the private vessel may be compelled to send on board the belligerent cruiser any persons or documents for examination, in place of visit from the latter, and in several ways such a step would seem to be inconsistent with the principles underlying the practice of visit, for it seems to throw the burden of action to prove innocence on the private vessel and imposes on the latter all the incidental difficulties involved in such a task.

The boarding officer must begin with an examination of the ship's papers. If these furnish conclusive evidence of her freedom from liability to further action the vessel must be allowed to proceed. If they present evidence of probable cause for liability she may be proceeded against further without examination or search of the vessel herself. If there still be reasonable doubt as to the true character of the vessel, her cargo, and her activities, the boarding officer may, with the help now of as many of his own men as necessary, question the personnel of the vessel—passengers, officers, and crew—and examine the vessel and her cargo, accepting any help or information voluntarily given by the ship's officers and crew, but not applying to them any coercion to this end. This action, as well as the mere visit, must be carried out without undue delay or inconvenience. At the end the whole proceeding, whatever be the result, must be entered in the ship's log, with the date and place of the action. It may be added that the belligerent has no right to detain the merchant vessel in the absence of evidence of guilt ascertained on the spot or to conduct her to port for further search.

Among the various types of private vessels, enemy and neutral, to be encountered on the high seas are a few on

whose behalf an immunity from visit and search has been claimed at one time or another, by one or another state.[11] Such are all mail ships and their cargoes, neutral vessels and cargoes under convoy of neutral public vessels (themselves exempt from visit and search), and scientific or philanthropic vessels, of whatever nationality. It must be admitted, however, that the immunity demanded for the first class of vessels and cargoes has not been conclusively established; and that the vessels of the types last named, while they may be immune to further penalties from the belligerent, must submit to visit and search to establish the foundation for that immunity. Finally, while neutral merchantmen under neutral convoy are free from visit and search—the declaration of the commander of the convoying vessel regarding the ships in convoy and their cargoes being accepted, in the absence of evidence destroying confidence in that declaration, as conclusive by the belligerent—neutral vessels accepting belligerent convoy are *ipso facto* liable to seizure without even visit or search, and where the word of even the neutral convoy officer is suspected of error further evidence may be demanded of him at once.

As a result of the evidence collected by visit and search the private vessel in question may be subject to further liabilities, particularly to capture and condemnation as prize of war. It is to test her liability to such treatment that visit and search are undertaken in the first place. And the grounds for capture—probable liability to condemnation—have already been stated in general. Liability to capture and condemnation, however, may result from any one of many facts, and it is now necessary to

[11] On immunities from visit and search see: Institute, 48–49, 181, 188; Hyde, §§ 733–735; Hall, §§ 271–272; Bonfils, Nos. 1595–1604; De Louter, §§ 50, 59.

examine in detail those facts or actions creating such liability.

A private enemy merchant vessel and cargo is liable to condemnation as good prize of war because of her enemy character alone, unless, in addition, she falls in one of certain classes of vessels exempt from capture and condemnation. This being the case, it becomes extremely important to establish satisfactory tests of enemy or neutral character for vessels and cargoes, and to restrict transfers of vessels and cargoes from enemy to neutral flags to prevent evasion by collusive or fraudulent sales. But, beyond noting the rule that a vessel's nationality is fixed by her registry, not by the nationality of her owners, while that of the cargo is fixed by the nationality of the owner, and that all sales to neutrals of belligerent public or private vessels or cargoes during, or just preceding, war, which are made with the object or effect of unjustly protecting the vessels from capture and condemnation, need not be regarded as binding by belligerents, the details of the law regarding enemy character of vessels and cargoes must be omitted from further examination here. It may be added that, out of deference for the neutral, enemy cargo on neutral vessels is no longer subject to condemnation as such.[12]

As in the case of visit and search, so here we encounter certain exemptions from capture and condemnation which may be disposed of in summary manner. Enemy vessels, together with cargoes and equipment, which are engaged in petty inshore fishing or local coastal trade, scientific

[12] On enemy character of vessels and goods, and liabilities of enemy and neutral vessels and goods to capture and condemnation see: Institute, 186–188; Hyde, §§ 762, 766–770, 783–796; Hall, §§ 146–150, 169–171, 267–269; Bonfils, Nos. 1281–1338; 1343–1349, 1355–1361; Liszt, § 41, V; De Louter, as cited.

investigations, or philanthropic work, vessels sailing under permits in connection with licensed trade with the enemy, relief of the wounded, or exchange of prisoners, are so exempt. Needless to add, abuse of the privileges so accorded by participation in hostilities, no matter how indirectly, forfeits the immunity in question.[13]

Capture consists of an imposition of legal authority and physical control by the captor upon the captured vessel, for the purpose of conducting the prize into a prize court for adjudication.[14] Any detention with the purpose merely of further search falls short of capture. As has been said, capture is always justifiable in the presence of evidence of probable cause for condemnation.

The effect of capture is in one direction very inconclusive, in other directions very decisive. On one hand, title to the vessel is not divested from the present owners, the ownership remaining the same while the vessel passes from the jurisdiction of the state of registry of the prize to the state of the captor. The captor, moreover, has a duty to conduct his prize without undue delay to a prize court for adjudication—and release if the capture is not sustained. It is also his right to do this, and even, apparently, to compel the crew of the prize to navigate her into port after capture.

In certain circumstances, on the other hand, the captor may destroy his prize or convert her to his own use at once.[15] The rules of law vary for enemy as against neutral

[13] On immunity of enemy vessels from capture see: Institute, 183–186; Hyde, §§ 766–770; Hall, § 148; Bonfils, Nos. 1350–1354; Liszt, § 41, V, 3; De Louter, § 50.

[14] On capture see: Institute, 181–182; Hyde, §§ 752–755; Hall, §§ 274–277; Bonfils, Nos. 1398, 1401; Liszt, § 41, II.

[15] On destruction of prizes see: Institute, 55, 198, 200; Hyde, §§ 756–758; Hall, §§ 150, 277; Bonfils, No. 1415; De Louter, § 59.

prizes. Enemy prizes may be destroyed when the retention of the vessel and conducting her to a prize court would endanger the safety of the captor, or the military operations in which he is at the moment engaged, because of stress of weather, lack of men for a prize crew, unseaworthiness of the prize, disease on board, or other similar circumstances. Neutral prizes may also be destroyed for the same causes, but here the captor will be under an obligation to prove to the court first of all the necessity for such action, and if in this he fails the question of the liability of the vessel to capture and condemnation is not open. In both cases, assuming the necessity of the destruction, the question of prize or no prize is still open for adjudication, and to the end that this adjudication may proceed to the result of justice the captor is under obligation to preserve for the court all papers found on board at the time of capture. He is also under obligation—an obligation paramount to the right of destruction—to provide for the safety of all on board the prize before destruction; just what will satisfy this duty is much in dispute, whether open boats in a choppy sea, or the deck of a submarine, or what not. It will be noted that this final limitation on the right to sink may easily operate to destroy that right altogether in certain circumstances, and that it is a privilege lost by a merchant vessel attempting to escape visit or capture.

It will be remembered that a vessel resisting visit or capture may be destroyed with impunity in an attempted capture. This rule at times seems to conflict with the rules regarding destruction of prizes. This is particularly true regarding armed private vessels, belligerent or neutral.[16] Private vessels may carry arms to resist pirates

[16] On armed merchant vessels see: Hyde, §§ 709, 742; Hall, § 182.

or illegal attacks from any quarter, including belligerent captors acting in excess of power. So long as no offensive action is undertaken or intended, and no action in resistance to legal belligerent action, the private vessel is still entitled to all the respect to which she is privileged by her non-combatant character. There are, however, no entirely reliable tests of the intentions of a private vessel encountered at sea and known or believed to be armed; neither the caliber and position of the guns mounted, nor their number, nor the orders which her officers are reputed to have received from their government. Hence, only the actual behavior of the vessel when encountered can be taken as proof of her combatant or non-combatant character. This means that there ordinarily exists no right to attack her in anticipation of expected offensive action on her part. And, while this may mean that certain types of belligerent vessels—submarines, and similar vulnerable craft—might not dare approach a prospective prize, capable, by illegally attacking a captor acting within his rights, of destroying him at sight, it may be averred that belligerent states are not likely to order their merchantmen to assume the rôle of warships, nor are the owners likely to be willing to see their vessels assume such a rôle, in the absence of just ground to expect illegal action from captors at every turn. It may be added that, even if this were the case, until a general agreement can be obtained denying the right of merchant vessels to arm, the new and specially vulnerable belligerent craft must take the risk. It may also be added that the merchant vessel is forbidden to attack in defense until she is herself attacked, and that this places her in a position in reference to the submarine as hazardous—taking into account possible illegal action on the part of the latter—as that of the submarine itself. And until means can

be found to prevent illegal action by submarine commanders—means other than turning all merchant vessels into war vessels and thus inciting instead of discouraging such illegal action—the merchant vessel must take that risk. This is an intolerable situation for all concerned, and must be remedied, but as the law stands it is the actual situation *de jure*. To hold that fear of attack, based even on prior attacks on other vessels or proclamation of intention to attack, justifies an "offensive-defensive" attack is to throw away such immunity as remains in cases where the law is observed, to gain nothing in return, and to admit the power of one belligerent by prior notice to relieve himself of all restrictions of law in the matter, an impossible admission. If life and property on enemy ships are to be safe it may be necessary to make such ships free from capture or destruction, but that cannot change the law as it stands.

The hold of the captor over his prize prior to adjudication may, of course, be disputed by force by the enemy.[17] In such cases the inchoate title of the captor disappears and certain complicated questions arise—questions treated collectively under the name of rights of postliminium—relating to the private ownership of vessel and cargo and to the rights of members of the crew, only very indirectly connected with the freedom of the sea. Of such a character also are the questions arising out of the possible practice of a belligerent in releasing his prizes in consideration of a certain sum of ransom money, and issuing in evidence a ransom-bill specifying the conditions on which the prize has been released. Such conditions restrict the freedom of action of the released vessel under

[17] On recapture, ransom, and postliminium see: Institute, 77, 199; Hyde, §§ 759–760, 922; Hall, §§ 151–152, 166; Bonfils, Nos. 1414, 1416–1421, 1710; Liszt, § 41, V, 6; De Louter, § 50.

penalty of recapture and condemnation if met again by a belligerent vessel of the same flag.

Assuming that there has been no destruction of the prize and no recapture, however, the final step is that of adjudication by a prize court upon the liability of the vessel to condemnation, and the liability of captors or claimants of vessel or cargo to damages, costs, or demurrage for unwarranted capture and delay. To this proceeding and the ground for condemnation we now turn.

As was mentioned in passing upon another topic, an enemy private vessel is liable to condemnation on that ground alone, as is enemy cargo found on enemy vessels —but not enemy cargo on neutral vessels. For that reason the determination of what is and what is not enemy property—ships and cargoes—is one of great intricacy and practical importance, although too far removed from the centre of the problem of maritime freedom to be dealt with in detail here. We have now to note also that a neutral vessel which knowingly takes part in hostilities by carrying for the enemy dispatches or military forces or officers, providing him with information, or, in general, directly aiding him in the war, is likewise liable to treatment as an enemy ship, under the title of unneutral service.[18] With the vessel in such position is to be included all cargo belonging to the same owner. So for neutral vessels placed under the orders or charter control of the enemy. So, finally, for a merchant vessel carrying papers which, on the points at issue, are inadequate or fraudulent, or where there has been a spoliation or destruction of papers at time of capture. In the last case

[18] On unneutral service see: Institute, 52, 76–77, 130–131, 142–143; Hyde, §§ 817–823; Hall, §§ 248–253; Bonfils, Nos. 1584–1588; Liszt, § 42, IV, 5; De Louter, § 58.

it is assumed that the error, fraud, or malpractice conclusively indicates enemy property.[19]

If the vessel and cargo be not of enemy ownership, they may, one or the other, or both, be liable to condemnation for attempted breach of blockade.[20] If a neutral vessel disregards notice of blockade and attempts to enter or leave a blockaded port she may be captured and condemned as good prize. Capture may only be made if actual or constructive knowledge of the existence of the blockade can be established, but if this can be done a vessel is liable to capture on account of her intention to attempt a breach of blockade, provided she is at the time within the radius of action of the blockading squadron, and is actually bound for a blockaded port. Cargo on board a captured blockade-runner is liable to condemnation along with the vessel unless the claimants can prove entire ignorance of any intent to run the blockade on the part of the vessel at time of shipment. The liability to capture and condemnation attaches to the guilty vessel until the termination of the current voyage, although this does not warrant capture in circumstances where it would not be otherwise legitimate.

Carriage of contraband goods, or contraband character, constitutes the second ground upon which neutral vessels and cargoes as such may be condemned.[21] By general law certain varieties of commodities may be treated as

[19] On false or deficient papers see: Institute, 49–51, 182; Hall, § 276.

[20] On condemnation for breach of blockade see: Institute, 53, 76–77; Hyde, § 837; Hall, §§ 264–265; Bonfils, Nos. 1659–1673; Liszt, § 41, IV, 3; De Louter, § 57.

[21] On carriage of contraband and liability to condemnation on this ground see: Institute, 15, 51–52, 76–77, 129–131, 141–143, 183, 198; Hyde, §§ 814–816; Hall, §§ 236–247; Bonfils, Nos. 1569–1583; § 42, IV, 3; De Louter, § 58.

contraband of war by belligerents, and neutral cargoes and vessels treated as subject to condemnation on that ground. All goods exclusively useful in the operations of war are subject to treatment as "absolute" contraband and liable to capture and condemnation as such whenever they are found destined directly or indirectly to enemy territory.[22] Goods indifferently suited for military and for civilian use are regarded as "conditional" contraband, liable to capture and condemnation if destined to the armed forces or the government of the enemy, either through enemy ports or through neutral territory. Goods not capable of military use may not be treated as contraband at all. On the other hand, non-contraband goods belonging to the owner of contraband goods on the same vessel are liable to treatment as contraband on a par with the latter. It is obvious that before these principles can be applied in practice attempts must be made to specify the actual commodities falling in the three classes named. This application may be made by each belligerent for himself, within the limits of the principles agreed upon, and subject to neutral complaints and criticisms on that basis. Needless to say, it would be well if agreed lists of contraband could be drawn up, and revised from time to time, to prevent variations among belligerent and neutral holdings on these matters, and to take account of changes in the technical and social methods of conducting war affecting the question at issue.

A vessel carrying a contraband cargo is not ordinarily held to be liable to condemnation, but suffers merely loss of time, prospective freight, and expenses. When the contraband cargo belongs to the owners of the vessel, how-

[22] On indirect transportation of contraband, or continuous voyage, see: Institute, 129; Hyde, §§ 808–813; Hall, § 247; Bonfils, Nos. 1567–1570; Liszt, § 42, IV, 3; De Louter, as cited.

ever, the vessel is also liable, and this is equally true in cases of fraud or attempted fraud, as by falsification, concealment, or destruction of papers. The vessel may likewise be condemned if the contraband goods form more than half the cargo, by value, weight, volume, or freight. Even if released she may be compelled to pay the costs of the proceedings. On the other hand, if she is not herself liable to condemnation she may secure a right to continue her voyage without capture and adjudication if, upon visit and search, the contraband cargo may, in the judgment of the captor be conveniently surrendered at once, and the master of the neutral vessel is willing to do so. Finally, the vessel is liable only during the current voyage, deposit of the contraband cargo terminating her liability, again in the absence of fraud.

The treatment to which the persons found on all sorts of vessels at sea in time of war varies with the nationality, status, and activities of those persons and the nature of the vessels on which they are found. It constitutes an especially significant portion of the general question of maritime freedom in time of war.[23]

Officers and crews of neutral public vessels are free from all control or action by other powers, and are only liable, in point of fact, to injury in so far as they take themselves into areas of actual hostilities, including mined areas. They are even able to pass, on permission, unharmed through a blockading fleet.

Officers and crews of enemy public vessels, and all passengers on board such vessels, whether military or civilian, enemy or neutral, are liable to the injuries which may come to them as a result of attacks legitimately made

[23] On treatment of persons on captured vessels see: Institute, 69, 189–190, 192; Hyde, §§ 773–775; Hall, § 131; Bonfils, Nos. 1339–1342.

upon such vessels. Where the vessels are exempt from attack the personnel is automatically freed from danger of injury. In case of the capture of enemy vessels of war all persons on board are liable to, and entitled to claim, treatment as prisoners of war. Neutral persons who intrust themselves to such vessels for transportation assume this risk. Civilians are entitled to be regarded as civilian prisoners, to a form of detention and treatment less severe than that given to prisoners of war proper. With regard to both classes of prisoners the capturing state is bound by requirements of humane treatment similarly applicable in land war. They must be maintained in safety, health, and minimum comfort, and if these requirements cannot be met on board the capturing vessel the capture becomes legally impossible unless the prisoners are allowed to remain on their own vessel.

Officers and crews of enemy merchant vessels, where the latter have not taken part in hostilities, are entitled to be treated at least as civilian prisoners, or even to release upon a pledge not to take part in the war. Where their vessel has taken part in hostilities they are to be put on a par with military prisoners—as are all military persons found on board in any case. Neutral persons on board such vessels are entitled to release.

Officers and crews of captured neutral merchant vessels and other neutral persons on board are entitled to release at once, unless the vessel has been guilty of participation in hostilities on behalf of the enemy. In such a case, and in a case of neutral resistance to legitimate belligerent action, the officers and crew, but not the passengers, would be entitled to treatment as civilian prisoners. Enemy persons may be treated according to the rules for treatment of enemy aliens generally.

Finally, officers and crews and staffs of enemy or neu-

tral vessels devoted to the care of the sick and wounded in naval war are immune from attack and capture, as are those portions of all vessels devoted to the care of the sick and wounded.[24] Such vessels and parts of vessels must not be devoted to military purposes, they may be visited and searched, temporarily detained, ordered off, and, in general, controlled by all belligerents within the limits of their general objects and the necessities of the case. All such vessels must be clearly designated as such in order to enjoy such immunities. All sick and wounded and shipwrecked persons in naval hostilities are prisoners of war of that belligerent into whose power they fall or who takes them from neutral hospital vessels. Other rules attempt to accord to these unfortunate persons an opportunity to regain health and return to normal life at the end of the war.

In closing this review of belligerent action at sea it is to be noted that no belligerent action may ordinarily be taken in neutral waters and that neutrals have the right and the duty to prevent such action and to forbid access to, or to expel from, their territorial waters all belligerent vessels if they feel that such action is necessary to protect their neutrality.[25] On the other hand, the neutral is not obliged to prevent its citizens from attempting to run a blockade, from shipping contraband, or from performing unneutral service. Belligerents may and must be prevented from using neutral waters as bases of operations

[24] On status of hospital ships and personnel see: Institute, 183–185, 190–191, 193–195; Hyde, §§ 769, 776–782; Hall, § 130; Bonfils, Nos. 1280, 1353; Liszt, § 41, III.

[25] On hostilities, including the fitting out of expeditions, asylum, and the cutting of cables, in neutral waters, see: Institute, 12–14, 47, 154–156, 162; Hyde, §§ 723, 850–865, 887–888; Hall, §§ 220–231; Bonfils, Nos. 1449–1455, 1463–1470, 1278; Liszt, § 42, II.

against the enemy. Belligerent vessels may not be accorded unlimited asylum and facilities for repair and replenishment in neutral ports, nor may belligerent prizes be held in neutral ports for protection against recapture; internment is the remedy applicable for excesses committed by belligerents in these matters. Finally, belligerents may not interfere, within neutral waters, with submarine cables connecting the neutral with the enemy; it is, moreover, the duty of the belligerent to restore to working order at the end of hostilities, all cables cut, whether in belligerent waters or on the high seas.

It may be worth while to insist, by way of defense for what may appear to have been an unduly long recital of the details of the law of naval war, that the freedom of the sea in time of war is expanded or diminished to some extent by every rule of that law. Every addition to the list of contraband, every restriction upon the placing of mines, every addition to the right of visit and search, expands or diminishes by just so much the freedom of the seas in time of war. By no means all of the details of the law regarding maritime warfare have been set down in the text. All those which have been set forth relate in a fairly direct manner to maritime liberty in time of war.

CHAPTER VIII

THE LAW REGARDING PIRACY, SLAVE-TRADE AND NAVIGATION

It will be remembered that piracy and efforts to suppress piracy constituted, in former ages, a somewhat special and peculiarly interesting phase of the problem of maritime power and jurisdiction. To-day the subject is of far less importance. But it still remains the most peculiar and irregular aspect of our problem, one which, in a most disconcerting manner, cuts across the lines of principle already laid down.

Piracy, under international law, consists in the use of force at sea outside of the limits permitted by general consent.[1] It may take the form of attempts illegally to destroy or capture vessels or cargoes or to kill or capture persons, from motives of private greed or malice. It may be undertaken by one or more persons of one or more—or no—national allegiance, pretending to act for private or public ends, with or without public authority. The acts may be directed against a vessel on which the persons committing those acts are stationed at the time, or against its personnel; against another vessel; or against a vessel, the persons committing the action being on shore or in the sea itself.

Piratical acts committed by persons of any, or even of no, nationality, while themselves within the territorial

[1] On piracy see: Hyde, §§ 231–234; Hall, §§ 81–82; Bonfils, No. 594; Liszt, § 26, IV; De Louter, § 22.

waters of a second state, are subject to punishment by the state where the action takes place, even when directed against persons, property, or vessels of a "foreign" state. So, of course, for piratical acts committed within the territorial jurisdiction of a state by its own citizens. So, finally, for acts committed by its own citizens or aliens or persons of no nationality on board its own vessels, or on vessels of foreign registry within the territorial waters. In practically every case where piracy is attempted within or from territorial waters the littoral state has authority under international law to proceed against the offenders according to its own judgment and its own penal laws. And there is substantially no limit placed by international law on the punishment which may be meted out to the pirate, including the death penalty itself.

Where piratical acts have been committed on the high sea difficulties arise at once. If committed from or upon a vessel of given nationality or against such vessel from the sea, the flag state may, of course, seize and punish the marauders no matter what their nationality. If, however, the acts be committed from a vessel of one nationality, against the persons or property of a second state, the case is not so simple, and where the former vessel, although flying a recognized flag, is suspected of further piratical intentions or past performances of this character, the difficulties increase proportionately. Where piratical persons from a foreign vessel are later found within the jurisdiction of the injured nation they may be punished as such. And where a vessel flying a foreign flag is discovered actually employed in what international usage stamps as piratical practice it may be seized, together with its piratical crew, by any nation, for proceedings under its law appropriate to the case, the actual pirate being held to be in rebellion against the law of

nations itself and it being manifestly illogical and ineffective to try to hold the flag state, or the state of which the pirate is a national, exclusively responsible. But it cannot be said that the naval vessels of all nations possess a general right of visit and search in time of peace over the vessels of all nations for the purpose of detecting piracy. In the absence of special agreements for mutual rights of visit and search in such situations, of which there are several, to be referred to more fully in discussion of the suppression of slave-trading, such visits are undertaken with the risk that, no sufficient evidence of piracy appearing, the state whose officers have interfered with the merchant vessel of another nation may be compelled to apologize and compensate for its action. On the other hand, if such evidence is found, not even the express authorization of a recognized state—as by commissions for privateering—will suffice to excuse the piratical acts.

It becomes difficult at times to draw the line between piracy and war or insurrection.[2] In spite of the rule stated at the close of the preceding paragraph, it is also true that acts against the enemy or against neutrals by a belligerent in excess of his rights at sea, such as captures on inadequate grounds, or even destruction of prizes on inadequate grounds, do not necessarily lay him open to prosecution for piracy. This is because such actions were obviously undertaken not for private but for public ends (a reason insufficient in all cases to protect from the accusation of piracy), and because errors both of law and fact may be made by belligerents with the best possible intentions. Finally, while the maritime activities of unsuccessful insurgents or revolutionists, whose right to

[2] On belligerency and maritime insurgency see: Institute, 158; Hyde, §§ 47–50; Hall, §§ 5, 5a; Bonfils, No. 200; Liszt, § 39, II, 2.

conduct war has not been—as it may be, under certain circumstances—recognized by the parent state or by others, although well within the limits of the law of war, and not committed for direct private gain or direct private purposes of any kind, would be, under the general principles governing the subject, technically piratical, nevertheless, by a form of recognition adapted especially to this situation, it is held that a state of public rebellion or insurgency specifically relieves the participants of liability for prosecution for piracy. This does not render captures by insurgent cruisers legal, for example, but it does mean that they are not illegal to the degree of being piratical.

Closely akin to piracy is the slave-trade, as regarded by contemporary international law.[3] It had always been held that slavery itself existed merely by positive legislation, being contrary to the condition of nature. From this to the prohibition by national and international enactment of slave-capture and slave-trading was a long and slow step, and, in the meantime, efforts to have slave-trading regarded under customary international law as piracy were unavailing.[4] The step was, however, eventually taken, and, by the middle of the last century, it was agreed in one treaty after another that the holding in possession on ship-board of human beings for sale as chattels was contrary to the law of nations.[5] Even this action did not suffice to warrant visit and search and capture by the naval vessels of one nation of vessels flying —honestly or fraudulently [6]—the flag of another nation on

[3] On maritime slave-trade see: Institute, 93–97, 111–113; Hyde, § 230; Bonfils, Nos. 398–408; Liszt, § 36; De Louter, § 22.

[4] DuBois, §§ 69, 70.

[5] Data on national and international legislation abolishing slave-trade in same, §§ 66, 71 (note 1) and Appendix B.

[6] On fraudulent use of flags in slave-trade see same, §§ 69–70.

suspicion that the latter were engaged in the slave-trade. If a vessel or persons of any nationality were actually discovered by cruisers of their own nation engaged in such trade they were subject to seizure and prosecution, as already described. But if a visit to detect such activities were undertaken by others, in absence of special agreements, the result was likely to be similar to that in the case of suspected piracy. It was, moreover, found difficult to obtain international agreement for mutual rights of visit for the suppression of the trade.[7] But in the slow course of time several such agreements have been concluded, and these must be taken into account in estimating the actually existing measure of sea-freedom in this direction.[8] Under common law, however, there is no right of visit and search in time of peace even for vessels not deprived of a right to national protection by being actually engaged in one form or another of piracy. That is, there is no general right of visit for the purpose of suppressing piracy and slave-trading apart from conventional agreements.

It will be recalled that, at the beginning of our review of maritime law it was stated that the open ocean was the home, *par excellence,* of the freedom of the sea, and that, in time of peace, every vessel, and every person thereon, was free from interference, when upon the high sea, by any state except that whose flag was flown at the

[7] On the way in which the trade was carried on contrary to national law, neglect on the part of individual states to enforce their anti-slave-trade laws, refusal to outlaw the trade by international agreement and to grant Britain or other nations mutual rights of visit and search for the enforcement of the national or international prohibitions—out of jealousy of British sea-power and solicitude for the trade itself—see DuBois §§ 69–70, 72–73.

[8] Same, §§ 68, 71, 73.

mast-head of the vessel. It now becomes necessary to conclude our review of maritime law by taking note of a qualification to be imposed upon that statement, a qualification which is outwardly a complete denial of the freedom of the sea in its most cherished habitat and inwardly a complete embodiment of true maritime freedom. The reference is to the rules of navigation at sea.[9]

In territorial waters, as has been seen, each littoral state is free to prescribe the rules of navigation to be followed by vessels of whatever nationality entering those waters, and to enforce those rules by appropriate action, including the seizure of vessels, the imposition of fines and other penalties for disobedience, or the awarding of damages to be paid by parties guilty of violating those rules to parties injured as a result of that disobedience. Even foreign public vessels are under obligation to obey territorial navigation rules and may at least be expelled for violations thereof. Any foreign private vessel committing a breach of these rules may be pursued out upon the high seas and there seized and returned for punishment, or if she escape, protest may be made to her home government through diplomatic channels.

It follows also, from the general principles of the law, that each state is free to make rules of navigation for vessels flying its own flag upon the high seas, and, those vessels again coming within its power and jurisdiction, to punish for infractions thereof. It would, however, have been disastrous, as a matter of actual marine practice, for the various maritime states to adopt separate and divergent rules governing this matter. It would, moreover, as a matter of historical development, have been

[9] On rules of navigation see: Institute, 65–67, 83–86; Hughes, *Admiralty Law*, Chaps. XII–XIII; La Boyteaux, *Rules of the Road at Sea*, entire, especially 1–8; De Louter, § 22.

unnatural and technologically impossible. The very conditions and pressure of ocean commerce compelled the adoption of uniform rules.

These international rules of navigation developed rapidly, on the basis of tacit consent, during the early modern period and had reached a rather complete stage of growth by the beginning of the last century. Single rules, single principles, and groups of rules and principles, had made their way into the legal systems of individual nations, and had come to be enforced by national courts obtaining jurisdiction of vessels or persons guilty of violating these rules of general maritime law. During the latter part of the century this process was accelerated by treaty agreements, and the customary international rules of navigation were thus given full standing as international law.

As a result it may be said that every vessel, and every person in charge of a vessel, upon the high seas, is bound to act in accordance with the international law of ocean navigation,—the rule of "stop the engines," the "general prudential" rule, the rule regarding "close shaving," and so on,—and is liable to punishment or an award of damages for failure to so act. Moreover, such punishment may be applied by any nation into the jurisdiction of whose courts the vessel shall come, the international rules being adopted as part of the local law for this purpose.

This state of affairs may well appear to destroy the last vestige of freedom at sea. There is, apparently, no vessel, of whatever nationality, which is not subject at every moment and in every part of the seas to the jurisdiction of some state, her home state usually, but potentially also a foreign state. No individual navigating the sea is free

from some measure of potential control in time of peace and time of war, by a state of which he is not a citizen and in which his vessel is not registered. Even in the strictest sense of the word, the international sense, there is always an alien control hanging over vessels and mariners in all parts of the sea. Only a person without a country, navigating an unregistered vessel on the high seas in time of peace, and never putting into port, could enjoy anything like an absolute freedom of the sea, and even that person and his vessel would be liable to fall victim to the general international action against the commission of piracy and the slave-trade. In the absolute sense, the law being as it is to-day, in times of peace and war, there is, apparently, no such thing as freedom at sea.

When the basis of the rules of navigation just described is examined, however, it will appear that this point of view is wholly without justification. The only foundation for the authority of the rules of navigation upon the high sea is the general consent of the nations to their existence and operation and that of the mariners concerned, given through their national governmental systems. The existence of a rule of law or a principle of jurisdiction controlling the action of an individual or his property, the citizen and registered vessel of a given national state, is no denial of maritime liberty in any significant sense, so long and in so far as that rule is based on voluntary assent, as are all the rules of maritime international law. In the mind of the student of law and government this is the critical point.

The difficulty is that this contention may prove too much. If this be so it would be impossible ever to abridge the existing freedom of the sea. That would be just what

it was under existing law at any given moment. To this difficulty, and the way in which the legally recognized freedom of the sea expands and contracts from time to time we shall turn in the concluding chapters.

CHAPTER IX

THE EFFECT OF THE WORLD WAR UPON THE FREEDOM OF THE SEAS

In our statement and proof of the law of naval warfare no reliance was placed upon certain documents which until the outbreak of war in 1914 were widely regarded as constituting the best statement of the law of naval war which was available, namely, the Hague Conventions and the Declaration of London.[1] For this there are several reasons, and an examination of these reasons may well be undertaken at this point in the form of a study of the effect of the World War upon the international law of the sea in time of war.

The incidents of the various international wars which broke out in Europe from time to time after 1850 convinced the nations of the expediency and even the necessity of some effective effort for a clear and comprehensive statement of the law of naval war in terms of general agreement.[2] Within the limits of general principle as already set forth, the nations had gone ahead in the establishment and application of blockades, the use of privateers

[1] The Hague Conventions and the Declaration of London may be found, together with comments and explanations thereon, in Higgins, *Hague Peace Conferences;* probably the most useful edition of the Hague Conventions alone is that of the Division of International Law of the Carnegie Endowment for International Peace, and the most useful edition of the Declaration of London that by Bentwich.

[2] See the admission in the preamble of the Declaration of London; *Declaration,* preliminary articles, ¶¶ 3–6.

or auxiliary vessels, and in treating commodities as contraband, according to their own ideas of their own advantage and convenience, checked only by the wholly relative risks of retaliation by the enemy or the anger or acts of reprisal of a neutral whose commerce might be injured thereby.[3] The result was great confusion as to what were the requirements for a legitimate blockade, for the conversion of merchant vessels into war vessels, confusion as to what commodities might be treated as contraband, and so on. A further result was that, in the absence of agreed international law, national prize courts were free to apply national prize regulations with little consideration for enemy or neutral interests. This state of affairs was accentuated in the Russo-Japanese War with the development of "war zones," floating mines, the destruction of neutral prizes, and the extensive expansion of the idea of contraband; British and American protests did not suffice to halt Russian and Japanese innovations very effectively.[4] When the protests of the states most likely to suffer from the free application of national prize law by the chief naval powers, namely, the continental states and the prospective neutrals, finally took the form, about 1907, of a demand for an international prize court to review the decisions of national prize courts, the naval powers, led by Great Britain, at once felt the necessity for an agreed settlement of such outstanding disputes concerning the terms of the law and set about to obtain it.[5] Great Britain had not, formerly, been greatly interested in neutral rights at sea; now that wars between other

[3] Quigley, 30–54.

[4] Baty, "The Chaos in the Law of Nations," in *Penn. Law Rev.*, Vol. LXIII, 705 (June, 1915).

[5] *Declaration*, preliminary articles, ¶ 2; Potter, *International Organization*, 247–250.

states were becoming more common, however, and remembering what had happened to her shipping in the Russo-Japanese war, Great Britain rather suddenly evinced an enthusiasm for a clear statement of neutral rights for their own sake. The result of all these forces was a Naval Conference held in London in 1908–1909 and the Declaration of London of 26 February, 1909, to which attention will shortly be turned.

Similar efforts had been made on previous occasions. Of these an effort made at Paris in 1856 was the earliest and the most successful. The powers met to arrange definitive terms of peace at the conclusion of the Crimean War agreed upon four articles of law regarding naval war which came to be known as the Declaration of Paris. Although never signed or formally accepted as binding by the United States, the Declaration of Paris had by 1914 been signed or accepted by adhesion by all other civilized states and had become an integral part of general international law. It may be that the success of the Declaration of Paris can reasonably be ascribed to its brevity and generality, and also to the fact that it purported merely to announce rules or principles already accepted as part of customary law. Nevertheless, that Declaration marked the beginning of the attempt to define authoritatively the freedom of the seas in the only way by which it can ever be effectively defined, namely, by international legislation or codification.[6]

Further efforts to define and codify the international law of the sea were made at the Hague Conferences in 1899 and 1907. In 1899 the First Conference adopted a "Convention for the Adaptation to Maritime Warfare

[6] On the Declaration of Paris see Quigley, 30–33, and literature there cited.

of the Principles of the Geneva Convention of 22 August, 1864," which was intended to regulate the status of, and treatment to be accorded to, hospital ships and the wounded and sick in naval war.[7] At the Second Hague Conference there were signed seven conventions purporting to regulate further the conduct of maritime war,[8] including one convention by way of revision of the agreement of 1899.[9] Taken in the aggregate these conventions seemed to provide a fairly extensive statement of the law of naval war, a thing so much to be desired and so entirely lacking up to that time.

The Hague Conventions were not, however, entirely adequate to the needs of the situation. They omitted from treatment the essential questions of blockade, contraband, and visit and search, as well as some others. Agreements on these topics were not obtained at The Hague, leaving so much doubt and disagreement in the minds of the leaders of the great naval powers as to the exact extent of their recognized belligerent rights at sea that the proposal for an appellate International Prize Court, made at the same time, produced the reaction already described. If the Hague Conventions relating to naval warfare had been complete and reliable the London Naval Conference would never have been called and the Declaration of London never been drawn up and signed. For those topics with which the Hague Conventions dealt, however, no added attention was necessary at London in 1909.

With regard to the London Naval Conference itself little need be said.[10] The ten leading naval powers met

[7] III H. C. '99.
[8] VI–XI, XIII H. C. '07.
[9] X. H. C. '07.
[10] On the London Naval Conference see literature cited in Hershey, *Essentials*, § 85, note 80.

in London in the end of 1908, upon the invitation of Great Britain, and, after discussions ranging over a period of three months, accepted through the signatures of their delegates at the Conference a "Declaration Concerning the Laws of Naval Warfare," known thereafter as the "Declaration of London," and which dealt with all outstanding questions of the law of naval war. When considered in relation to the Hague Conventions and to the still older Declaration of Paris, the Declaration of London constituted the most notable effort at the codification of international maritime law yet undertaken, and an effort crowned, apparently, with a signal success, as evidenced by the signing of the Declaration by all the states participating in the Conference.

Yet neither the Declaration of London nor the Hague Conventions were found useful in compiling the statement of the law of naval war given above. And the reader may have noted that none of these documents were cited as supporting statements there made. An explanation of this situation involves a discussion of the application of the law of naval war during the World War and the reaction of the World War on that law.

Assuming for the moment that the Declaration of London and the Hague Conventions in question were sound and complete in themselves, their status in the World War depended rather upon external and formal considerations than upon these intrinsic merits. In form the Declaration and the Conventions were treaties and their binding effect must therefore be judged by the rules applicable to questions concerning the binding force of treaties. And when such tests are applied the results for our purpose are partly destructive, and ambiguous or equivocal at best.

For in each of the Hague Conventions it was specified

that the agreement should only be binding upon the signatories when all belligerents in a given war were among the contracting parties.[11] The signatories were obviously unwilling to handicap themselves, as they saw it, by imposing limitations upon their activities in a war in which certain of their opponents were not consignatories and were not, by the principles of international law governing the binding force of treaties, bound thereby. This is but a specific example of the way in which, given the principle of national sovereignty in combination with the rule of contemporaneous unanimous consent to every international statute, in the absence of any prior agreement for legislation in conference by majority vote, international legal reform is limited to such steps as the least progressive state will take, by a process of general or universal participation.[12] Inasmuch as all of the pertinent Hague Conventions of 1907 lacked ratification by one or more of the belligerents—chiefly Balkan states, and Servia above all—they were deprived of effective force for all nations in the war.[13]

The Declaration of London was in a similar, or worse, position. While signed by the leading naval powers participating in the London Naval Conference, it had not, at the outbreak of the World War, been ratified by any.[14] The Declaration, consequently was not binding as a treaty or convention. Thus the event in view of which the work of 1899, 1907, and 1909 had been undertaken, a general war where belligerent and neutral rights and interests would inevitably clash sharply and frequently, came upon

[11] III H. C. '99, Art. 11; VI H. C. '07, Art. 6; etc.

[12] Potter, 381–388.

[13] Garner, *World War*, Vol. I, 19; Hyde, Vol. II, 188.

[14] For explanation of failure of the Declaration to secure ratification see Potter, 249.

the world with no formally binding conventional code of the law of naval war available for the settlement of questions of disputed national rights.

Seeing that neither the Hague Convention nor the Declaration of London were formally binding, as treaties, upon the parties to the World War, it becomes necessary to inquire concerning their actual influence, or the influence of the rules of which they were composed. For it should be remembered that there are two aspects to every convention purporting to codify international law: the formal and the substantive. While not binding as a treaty, the convention may in substance be composed of rules of law which are themselves binding on grounds of custom or practice.[15] Most of the Hague Conventions, and, particularly, the Declaration of London, were claimed to be authoritative declarations of existing law, drawn up not so much to enact or alter that law as for the incidental purpose of avoiding disputes concerning its terms.[16] As such their rules might, perhaps, be invoked in their own name by interested parties, and they might be adopted and proclaimed by belligerents in like manner, either in whole or in part.

Naturally enough, when war broke out in 1914 belligerent and neutral states alike invoked such of the Hague Conventions and such of their rules as seemed advantageous to them.[17] This tended to destroy the appearance of unity attained so laboriously with the signing of the conventions, and was only possible by disregarding the fact that it was manifestly contrary to the intention of the whole action to split up the codes and recognize

[15] *Declaration*, Preliminary Provision.

[16] Hyde, § 596, especially Vol. II, 188, note 1.

[17] Garner, Vol. I, 21–25; see, below, Appendix C, Notes on Documentation, § 4, on Garner.

merely such rules as appeared to meet certain national needs, while disregarding others which had been agreed to by way of a bargain or compensation to other nations when the convention was being drafted.[18] The United States, as the leading neutral state, hoped to secure the assent of the belligerents to the terms of the Declaration of London for application in the war, but with no different result.[19] Together with the Hague Conventions the Declaration was partly observed by certain belligerents —but only where it was convenient to do so, and for reasons of concrete advantage, not out of respect for its authority—; it was partly repudiated at the start, and gradually abandoned, as the war went on, by other belligerents, until to-day the Declaration and the Hague Conventions enjoy no authority as official codes of international law.[20] From the point of view of the effort at official codification we are substantially back where we were in 1895.

It may appear to be only too obvious that, in the absence of ratifications, the Declaration and the Hague Conventions could not have been expected to bind the nations in the World War; how hope for any such thing, and why be surprised or chagrined at the outcome? The answer,— and the most telling description of the real effect of the World War upon the international law of naval war,— is to be found by an examination of the other aspect of these conventions, already referred to, namely their scientific, rather than legal, aspect. While not legally binding, they were, it had been hoped, scientifically sound. That is, they were supposed to be, in the main, accurate

[18] For principle that the codes were to be treated as units see *Declaration*, Art. 65.

[19] Garner, Vol. I, 30.

[20] For entire repudiation of the Declaration see Garner, § 23.

statements of the rules of the law of naval war as it stood in 1914, or just applications in detail of admitted principles of the law of war at sea, even of such as had not received definite application in previous practice. The Hague Conventions were intended to be declaratory of existing law; the Declaration of London is professedly such by the terms of its own preamble.[21] The mere signing of these conventions might be felt sufficient to warrant the conclusion that they were regarded as intrinsically sound as codes of naval law; whether it would be expedient to accept them as binding could be finally decided before proceeding to ratification. Hence the United States could plausibly ask for acceptance of the Declaration as a reliable statement of international law.[22]

This line of reasoning would, however, lead us to a further conclusion, more radical than the first. If the Declaration be sound law, as of 1914, then defiance and repudiation thereof was not merely a refusal to be bound by an unratified convention, which would not be so serious, but largely a denial of the binding force of those established rules in themselves. It is in this sense that it might be said that the effect of the war was to destroy previously accepted international law. The repudiation and rejection, more or less complete, of the Declaration of London and the Hague Conventions is important in a consideration of the effect of the World War upon the freedom of the seas because of the contents of those statutes, not because of their form. It leaves matters—so far as it is a fact—not merely where they were before the process of codification began, but where they were before the process of building up a body of generally ac-

[21] *Declaration*, Preliminary Provision.

[22] For a most vigorous, probably a too vigorous, expression of this view see Garner, Vol. I, 20, 34.

cepted customary law began, back in the seventeenth century.

Before drawing our final conclusions in this connection, it would be well to measure and to analyse more fully exactly how far and why the conventions under discussion were repudiated in the World War.

To begin with, the repudiation was, in substance and extent, far less than might have been expected and far less than has been commonly supposed. For that matter, the effect of the World War upon international law as a whole has been far less injurious and, in some directions, much more positively beneficial, than would be supposed or admitted by certain students of international politics and government.[23] The whole of the law of peace, about one half of all international law, and the most stable, the most fundamental, the most important half, was either left untouched or actually improved, developed internally, or supplemented externally, by practices or agreements worked out either during the war or immediately after, as a direct consequence thereof.[24] The law of neutrality was recognized and applied in the main just as might have been expected. Where apparently not respected, as in the matter of neutral rights at sea, several additional considerations are pertinent which in many cases more than account for the apparent violation of neutral rights at the time.

In order to present, first of all, a resumé of the facts regarding violations of the international law of naval war, the following statements may be made: (1) the lists of goods to be treated as contraband, both absolute and conditional, were enormously expanded, until finally the dis-

[23] On the general question se Garner, entire, especially §§ 572–577; also Wright, *Effect of the War*, entire.

[24] Wright, 436–458.

tinctions between absolute and conditional contraband, and even between contraband and non-contraband were abandoned by various belligerents;[25] (2) attempts were made to bar, by proclamation and by physical force, access to enemy and even neutral coasts, without complying with the law of blockade, by the use of mines and the creation of war-zones or closed areas on the sea, and by a broad application of the theory of continuous voyage;[26] (3) the principle of continuous voyage was also applied by national prize courts in connection with conditional as well as absolute contraband;[27] (4) vessels were taken into port or summoned into port while yet no capture had been made;[28] and (5) merchant vessels, enemy and neutral, were destroyed at sight or with very brief or very indirect notice.[29] The same is true of the condemnation by certain national prize courts of ostensibly neutral vessels which had changed owners during or just prior to the war, and of the treatment too frequently meted out to enemy hospital ships.[30] None of these actions could be justified by an appeal to the rules of naval law as of 1914 and some of them were actually forbidden by those rules. The rules of the Declaration of London and the Hague Conventions were thus largely disregarded and three out of the four rules of the venerable Declaration of Paris were substantially wiped out by the expansion of contraband lists, the wide application of the theory of continuous voyage, or "ultimate consumption," as it came to be called, and the creation of war zones. Indeed, with the expansion of contraband lists stimulated by the restric-

[25] Garner, §§ 495–499.
[26] Garner, §§ 214–227, 509–531.
[27] Garner, §§ 501–508a.
[28] Garner, § 500.
[29] Garner, §§ 228–243, 474–494.
[30] Garner, §§ 121–140, 319–330.

tions in rules two and three of the Declaration of Paris the neutral shipper is now worse off than he would be otherwise.

What may or should be said in explanation or mitigation of these activities, having in view the principle or ideal of the maximum legal freedom at sea in time of war and the binding effectiveness of international law in general?

In the first place, it must be insisted that what seems the most direct and flagrant attitude in the premises, namely, sheer defiance of and refusal to be bound by what is at the same time admitted by the offending party to be well settled law, was at once the rarest, and, from the point of view of the law itself, the least injurious behavior possible short of strict compliance with the law. In few cases during the war,—in only one case of note, and that not connected with the freedom of the seas,—did any state break the law, and admit such action and boldly defy the authority of the law.[31] In such circumstances the action was commonly sought to be justified by an appeal to considerations of equity or ethics held to be above the law; a defense not adequate to save the law from the disrespect meted out to it in the particular case, but calculated to indicate that in that particular case the vital ethical ideals to serve which the law exists could be better served by disregarding the law. And no permanent injury in such cases was done to the law, which, presumably, remained intact and could be applied in a later settlement or claims for violations of international legal rights. Certain acts of apparent defiance to established law seem to have been un-

[31] In the case of the invasion of Belgium: Garner, §§ 437–442. For British attitude very nearly but not quite the same see quotations from opinion of Sir Samuel Evans in *The Kim*, in Garner, § 506.

dertaken with the thought that, if damages had to be paid later, well and good, the advantage to be gained from a temporary or immediate defiance of the law would be worth the cost.[32] This is an attitude taken even more frequently, it may be suggested, by individuals within the state. The real injury in such cases, or the real obloquy, fell and must continue to fall, not upon the law but upon the deficiencies of the system of international government supposed to support the law. Where international law was openly defied during the World War it was not so much because the law was bad as because international organization for enforcement of the law was lacking.[33]

In more numerous cases where acts apparently in violation of the law were committed it was argued in defense that the law did not in fact forbid, or did, in fact, permit, what was being done.[34] Here the argument might be made in situations where the law was entirely silent on the matter in question, and where no assistance could be obtained by argument from principle or from analogy.[35] It might be made in situations where, though silent on the specific matter in dispute, conclusions might be drawn by inference from other rules or principles of the law.[36] It might be made, finally, in situations where new facts in the world of social life or the art of war made old rules inconsistent with the fundamental principles on which

[32] Compare Von Bethmann-Hollweg's remarks in the Reichstag on 4 August: "This is against the law of nations. . . . The injustice which we thus commit we will repair . . . "; Garner, § 437.

[33] Garner, §§ 578–579.

[34] Garner, Vol. I, 357; Vol. II, 320.

[35] As in the case of the use of liquid fire; Garner, § 189. In the field of naval law the submarine merchant vessel may be mentioned as an entire novelty, although here the old rules for floating merchant vessels might be applied; Garner, § 565.

[36] So for the use of poison gas; Garner, §§ 182–183.

they purported to be based and with which, in other circumstances, they had originally been consistent.[37]

While apparently evincing all respect for the law, such arguments in reality were the ones which cast most discredit upon the international law of 1914. For they indicated, so far as they were sound or even reasonably plausible, first, that there was considerable doubt as to what was the law of the sea in time of war in 1914.[38] They indicated, second, that even where well recognized the law was defective quantitatively, inadequate in scope and detail, leaving many matters untouched and leaving the nations without standards or principle for application in the circumstances.[39] They indicated, finally, that the law was inadequate qualitatively in several places, out of harmony with its own fundamental principles because of the changed facts of international life.[40] Such disputes concerning the content and import of the law revealed its inherent short comings and defectiveness more distinctly than simple defiance of its provisions.

The steps to be taken in view of those circumstances will be discussed in the following chapters. Meanwhile it is necessary to evaluate a little more precisely the effects of the World War on the law as just summarized.

[37] So for the distinction between contraband and non-contraband, conditional and absolute contraband, etc.; Garner, §§ 498–499.

[38] "It was equally inevitable that such a war should have brought to light many divergencies of view as to what the law allows and what it forbids . . . "; Garner, Vol. II, 452.

[39] "In the second place, the war brought out the fact that the existing rules did not by any means cover the whole field; that they were wholly silent in regard to . . . various agencies . . . "; same.

[40] " . . . the war demonstrated . . . that many of the rules . . . were inadequate, illogical, or inapplicable to the somewhat peculiar and novel conditions under which they had to be applied"; same.

The first effect, the revelation of the amount of disagreement among nations as to what was the law of naval war in 1914 is simple and fundamental. It carries us back to 1895 and dictates the conclusion that the conventions of 1899, 1907, and 1909 were not only lacking in authority legally, but, as complete codes, lacking in authority scientifically as well. Many of the rules found in those conventions were sound law, but many others were not, and the presence of a rule in those texts can not be taken as evidence of its validity in 1914. We are forced to conclude that many of the rules included in those conventions were placed there, or admitted there, by various nations not as statements of admitted law, but as concessions which were made for value received.[41] They were not declaratory of accepted law, but legislative changes undertaken or accepted at a price. When the price—the compliance of other parties—was lost by failure of the agreements to attain binding authority for lack of ratification, the whole fabric fell to pieces. The conventions signed at The Hague and at London were ineffective legally and they were also unreliable as scientific statements of what the law was.

It is for this reason, in part, that they are not taken as the basis of our summary of the law of naval war. The opinions of the private jurists are in many ways more reliable from the scientific standpoint than the pretended codes of the nations. As it happens, the Hague Conventions and the Declaration of London were largely based on the previously formulated conclusions of the jurists in the institute of International Law.[42] And so far as they

[41] For evidence of this see the account of the negotiations leading to the adoption of the Declaration of London, in Bentchwich, especially at 37–41, and the stipulation that the Declaration must be treated as a unit, in Declaration, Art. 65.

[42] Scott, Preface to *Resolutions of the Institute;* viii–ix.

differed from the latter it was by way of variations dictated by national political interest rather than greater scientific accuracy.

If a comparison were made, however, between the rules of naval war stated above and the rules found in the Hague and London codes few divergences would appear on the surface. For the important variations, between the Hague Conventions and the Declaration of London on one side, and true international law on the other, or, what is more important for us, between the codes of 1899–1909 and what the powers understood to be the true international law, are to be found in the details of application, the implied details, not found explicitly stated either in the Hague Conventions or the Declaration of London. In other words, the chief defect of the law as it stood in 1914 was not so much uncertainty because of disagreements on the main principles, but uncertainty in detail because of divergent political interests unreconciled in any compensated agreements, or sheer neglect to work out in detail, in anticipation of the actual event, the rules of the law of naval war.

Of these two causes or forms of uncertainty in details of the law the former had been recognized and an effort made to remedy the situation in 1899–1909, with what results we have seen. Nothing more needs to be said here on that score, except that the effort was made with a full realization of the chaotic conditions which would result if the effort failed.

If that task is taken up again, however, the difficulties of anticipating situations in detail and working out rules of the law in advance, the second and more intrinsically significant cause or form of uncertainty in the law of 1914, will reappear. And to it will be joined the last and the most important difficulty of all, the chief cause of the

very serious and damaging effect of the war upon international law, namely, the changes which have come about in our time in social and industrial and commercial practices and the art of war. The law of 1914 was defective partly by neglect, but mainly because of the appearance of state control of industry and commerce, military conscription, and means of submarine and aërial navigation, which rendered the principles, the assumptions, and the distinctions on which the law of 1914 rested questionable, uncertain, and, in certain cases, positively contrary to fact. In the face of the general character of modern war and of state control of food and other commodities the distinction between absolute contraband, conditional contraband, and non-contraband became meaningless; for nearly all seaborne commodities now serve the state in war and all increases in supplies for the civil population meant increases in released supplies for the army. The distinction between civilian and combatant population never had been recognized in cases of siege; now a whole state is besieged. In the face of the modern credit system trading with the enemy is a broad term. In the face of the submarine the rules relating to armed merchant vessels and the destruction of prizes are not at all what they were intended to be. It is in this sense that the war, or the conditions of warfare, the war in a mechanical sense, exercised an injurious influence upon preëxisting international law, by revealing its defects or rendering it largely obsolete. It was not, fundamentally, the animosities of belligerents, lack of organized sanction, the inability of the nations to agree upon its terms, nor mere neglect which made the law of naval war as it stood in 1914 ineffective in the World War. It was the fact that a sudden change, and a change not only sudden but deep and far reaching, had come over the character of the nations (as social and political systems) and the

nature (from a mechanical point of view) of war. When it is added that the Declaration of London, at least, was in places unsound—unduly restrictive of belligerent rights—even as matters stood, or were believed to stand, in 1909,[43] the results of the conditions and the events of 1914–1918 may be easily appreciated.

This being the situation, the old task is present to be faced anew and with a new and peculiarly difficult aspect added to it: to get agreement on the law of naval war,—the task of 1899–1909,—and this while taking into account the changed circumstances of the case. The objects in view are old, of course,—the preservation of a maximum of maritime liberty for individuals, especially neutral individuals, in time of war, while allowing belligerent states, so long as states are permitted to make war at all, to adopt as far as possible all measures consistent with the object of war and the attainment of victory over the enemy. To the divergent views put forward in this connection and a possible—perhaps the only possible—solution of the problem of the freedom of the seas in time of peace and war for the future, we now turn.

[43] Under the limitations on belligerent rights of the Declaration neutrals were to be almost as free to trade in time of war as in time of peace. If Germany had observed the law of 1914 on her part, and not by her prior breaches of that law most foolishly given the Allies opportunity to invoke the doctrine of retaliation she might well have escaped entirely the fate which overtook her; Sidebotham, J. B., "Freedom of the Seas," in Buxton, C. R., *Towards a Lasting Settlement*, 70, 77.

Part III

THE POLITICAL PROBLEM OF THE FREEDOM OF THE SEAS

CHAPTER X

THE POLICY OF THE CONTINENTAL POWER

When an attempt is made to state in general terms the degree of freedom which should, as a matter of right and justice, or of general convenience, be permitted to the nations and their citizens in the common use of the seas of the world the student of the problem immediately encounters two rather distinct and definite views or policies. On one side stand the sponsors of the freedom of the seas and on the other the opponents of that ideal or principle. At every turn we encounter this sharp divergence in the views, opinions, and demands of those interested in the question, and if we go beneath the surface of this divergence we shall discover more practical foundations for this disagreement in terms of principle. We shall discover two positions in point of geographical and physical fact which, when actually occupied by states, produce divergent policies on the question which we are studying.

Of these, the first may be described as the position and policy of the continental power. Inasmuch as it is this position and this view of the matter which produces or constitutes the demand for freedom at sea, which usually bears the chief burden of the argument, and which is the centre of attention in this work, we shall begin with an examination of this position and pass on to the attitude taken by the maritime powers in another chapter. In a final chapter an attempt will be made to reconcile these two views in a synthetic solution of the problem of the

freedom of the seas based on the principle of international interest, international right, and international organization.

The purely continental power or continental state might be defined as the state having no physical relations to the sea and hence no interests in the legal regulations obtaining with respect to the use of the sea. Such would be a state with no seacoast, no merchant marine, dependent for its supplies of food and raw materials used in manufacturing, and for such manufactured products as it needed to import, only upon its own wide stretches of territory or upon territories capable of being reached entirely by land, and interested only in markets for its own exports which could be reached entirely in like manner. To maintain its indifference to the sea the continental state should also be in a position to obtain any loans it might need, and to make any investments needed to take care of capital available for foreign lending, without coming in contact with the sea or with maritime states. And its citizens should be entirely independent of the sea in all their activities.

Such a state, of course, there never was, on land or sea. At least, no such state can be found to-day. There are some fifteen states in the world which have no seacoasts,[1] but, except for eight or nine of these states which are too petty to possess important interests of any sort or to receive serious consideration here,[2] all these states are in-

[1] See, below, Appendix C, Notes on Documentation, § 5. Examples of states without seacoasts are Bolivia, Paraguay, Abyssinia, Switzerland, Luxembourg, Czechoslovakia, Austria, Hungary, Andorra, Liechtenstein, San Marino, Armenia, Afghanistan, Nepal, Bhutan; Rand McNally, *Atlas*, 12–13, 48–49, 69, 83–84.

[2] Examples: Abyssinia, Armenia, Andorra, Luxembourg, Liechtenstein, San Marino, Afghanistan, Nepal, Bhutan; same.

terested in the sea indirectly, if only through their interest in international rivers.[3] No important state is entirely indifferent to the life of the maritime world. No state is so continental as to be uninterested in the activities of the sea.

Of course, if a purely continental state could be found that state would therefore be entirely oblivious to the legal problem here under discussion. The result would be an entire absence, on the part of such a state, of any solicitude for the freedom of the seas. Such a state would also be entirely devoid of any desire for maritime dominion, and to that extent the continental state is naturally the state which is least likely to threaten and destroy the natural, primitive, absolute freedom of the sea from all political and legal dominion. But such freedom, freedom in the absence of any discussion of the propriety or impropriety of sea dominion or sea freedom, in the absence of any discussion of the question in legal terms, would, as we have seen in another connection, prove nothing one way or the other on the point in which we are interested. Moreover, the purely continental state might just as willingly consent, without any injury to her interests, to a regime of maritime dominion under international law, and from the point of view of legal principle this is, perhaps, the position possible only to the purely continental state. In default of purely continental states in fact this attitude seldom emerges in history. We must turn, therefore, from the hypothetical "purely continental" state to the typical continental state if we wish to discover the familiar and characteristic continentalist attitude on the freedom of the seas.

The typical continental state, while mainly an inland

[3] Examples: Bolivia, Paraguay, Switzerland, Czechoslovakia, Austria, Hungary; same.

state, with extensive internal land frontiers in common with neighboring continental states, has a certain amount of seacoast, although not enough to make it a predominantly maritime state, such as a state occupying an island or a peninsula would be. It has, in addition to its system of internal vehicular and railroad transportation by land, a certain amount of merchant shipping, but not enough to place it among the dominant maritime mercantile states. It does not ordinarily boast of overseas possessions; as it acquires overseas colonies it tends to lose its character as a continental state.[4] It draws its main supplies of food and raw materials from its own or neighboring continental territories and disposes of most of its surplus in domestic or neighboring continental markets, while drawing some considerable proportion of its food or raw materials from overseas, and shipping some considerable proportion of its exports overseas. It is, in other words, a predominantly continental state with sufficient maritime interests to bring it into contact with the maritime world and give it some opinions and policies in that direction.[5]

It would be impossible to name the exact proportions between continental and maritime interests which must be discovered to enable us to classify a state as a continental state. If we turn to the actual world of today we find states which appear to behave as continental states with all sorts of proportions between coast-lines, domestic and overseas commerce, and the other factors which enter into

[4] See Michaelis' remarks in March, 1917, on Germany's need for colonies which could not be affected by sea power; *New York Times*, 15 March, 1917.

[5] Examples: Argentina, United States, France, Germany, China; *Statesman's Year Book*, 687–690, 486–507, 880–886, 950–954, 772–777.

the situation.[6] And, of course, many states stand in a position where their continental interests and their maritime interests are nearly equal, where, in considering the question of the freedom of the seas, they are either swayed from side to side by the circumstances of the moment,[7] or rendered more or less indifferent to the outcome of the great debate.[8]

In reality, the two contending views in this problem are not so much those of any given continental or maritime state, but of continental or maritime power as such. And continental or maritime power may appear in one or more states simultaneously. For the purpose of making things concrete, however, we shall continue to speak of "the continental state" and "the maritime state," intending in each case a state at the time speaking in that rôle, even though the other character or element be present and ready to appear at the next moment. For our purposes the quality of the power inspiring the current policy of the state determines its attitude and character for the time being.

It might, indeed, appear that, inasmuch as the only way in which a continental state can become interested in maritime matters at all, and likely to be accorded

[6] Examples: France and Switzerland, Bolivia and Brazil; same, 880–886 and 1342–1345, 723–725 and 733–736.

[7] Example: United States. Compare attitude taken by the United States at the time of the Civil War, in Brown, 210–212, and the following contradictory statements by independent observers: "America, like Great Britain, is a maritime nation . . . ," and "The United States is a self-contained continental power . . . ," in "The Freedom of the Seas, A Conservative View," as cited, and Hurd, "The United States as a Sea Power," in *Fortnightly Review*, Vol. CXI, p. 176 (1 February, 1919).

[8] Example: France; compare the way in which France simply followed Great Britain in all decisions on naval matters during 1914–1918; Garner, Vol. II, 287–288, and § 511.

any voice in discussions of maritime law, is by ceasing to be an entirely continental state and by becoming to a certain extent a maritime state, seeing that the extent to which a state voices its views on maritime questions is directly proportional to the growth of its maritime interests, the view of the continental state on maritime matters must be an unforceful and even self-contradictory view. Even assuming the exclusion from discussion of the entirely continental state, is this not a case where a minority interest, a subordinate interest, must count for naught, where a state must be either a predominantly maritime state with views deserving of attention in such matters, or a predominantly continental state with no views or interests in maritime questions entitled to attention? Upon what definite consideration can we rely to be sure that a state may expect to be heard in maritime matters even though a predominantly continental state, and what will finally determine whether a state, when it does speak out in international maritime circles, will speak as a continental or as a maritime state?

The latter question may be answered by going forward in our analysis another step. The practical line of demarcation between a continental state and a maritime state will now be found at the point where the maritime interests of a state become so considerable as to lead to the creation of naval power sufficient in its own eyes to protect those interests. On one side of that line are states, not, indeed, purely continental, and possessed of sufficient maritime interests to make them somewhat solicitous concerning the freedom of the seas, yet without naval power sufficient to protect their maritime interests.[9] On the other side are powers with such predominantly maritime

[9] Example: The Scandinavian states, especially Norway; *Statesman's Year Book*, 1162–1167.

interests that they place the bulk of their strength at service in the defense of those interests.[10] From the former we get, in spite of their maritime interests, the expression of the characteristic position of the continental state on the freedom of the sea. From the latter we obtain, of course, the view characteristic of the maritime or naval power, a view to be examined in the next chapter.

At this point we encounter a difficulty due to the possibility of error in human perception and judgment in all such matters. The continental state with rapidly developing maritime interests may be led to postpone the development of naval power adequate to protect those interests until the latter more than outweigh, in importance, the continental interests of the state.[11] That state will still be inclined to voice the position of the continental state in maritime discussions, as a general rule, and the extent of the growing maritime interests of the state will, in the absence of commensurate naval power, have the effect not of mitigating this position, but of intensifying it. This phenomenon tends to confirm the conclusion that the real test to be applied in classifying states as maritime or continental, respectively, is not the test of maritime interest but the test of naval power. This is attributable here, however, merely to the fact that such errors and abnormalities as that just described may occur. In the long run, and in the normal case at any one time, naval power and maritime interest will be found to coincide very closely. Furthermore, while naval development may often be postponed for what appears to be extraneous reasons—considerations of economy, pride in the army and a desire to continue to concentrate upon

[10] Example: Great Britain; same, 56–62, 72–83.

[11] Example: United States, 1875–1900; Brown, 217, on our position at the first Hague Conference.

that—nevertheless even in such cases the limits to such variations are fixed by the underlying facts of interest. In the end a navy will have to be built, and the army given less attention in proportion, to satisfy the export and import community and the shipping interests.

Likewise, the fact that a state continues to maintain a navy out of proportion to its needs, and assumes the rôle of a maritime or naval power in debate in international law and politics,—a thing which sometimes happens, as we shall see later,—while it reveals a similar possible discrepancy on the other side, between naval power and maritime interests at any one time in any one state, and between the two as tests in classifying states at all times in all cases as continental or maritime, still this cannot upset the classification for all general purposes. The effect which such variations may have upon the determination of the content of maritime law in conferences or conventions concluded at any given point of time will be discussed in connection with the position taken by maritime powers on such occasions. For the time being we may adhere to the concept of a continental state as one which, while it has a body of interests in overseas affairs which compel it to be solicitous respecting the law of the sea, has not such extensive overseas interest as, on a balance of the complicated considerations of safety, expense, economy, prestige, and so on, which are the decisive factors in statecraft, will lead to naval expansion such as would put it in position to dictate in international law and politics and protect its interests by force.

Before passing to a statement of the substance of the position of the continental state we may return to answer in a preliminary fashion the first of the two questions recently raised: upon what can we rely to be sure that the continental state will be heard at all? Upon the

general principle that international law as a whole is based upon the common consent of the members of the international community. That principle treats the law of nations as uniform in interest and authority. It does not say that the laws of war on the sea must be based upon the consent merely of all powers interested therein, or of all maritime powers. It does not say that the laws of war on land must be based upon the consent merely of all military or continental powers. It assumes, rather, that all states are, in fact, more or less interested in all the subject-matters of international law, and holds, therefore, that they are entitled to be heard in the development of rules upon all those matters. This is, of course, broadly true, but its special significance here is the way in which it provides an opportunity for the expression of the continental view—and demands that that view be given satisfaction, in the absence of adequate compensatory advantages—in a field where it would naturally be liable to exclusion or suppression. As will appear later, by virtue of compensatory considerations of one sort or another, the final weight carried by the expressions of policy and the demands of the continental states are scaled down, in the influence which they have upon the content of maritime law, almost to the vanishing point. But they do receive expression and call for some reply from the proponents of maritime authority.

The continental state, having a limited coast-line itself, and little opportunity and little reason for putting forward claims to territorial sovereignty over the sea on its own behalf, but being, on the other hand, interested in navigating the seas along the extensive coasts of the maritime powers, is not ordinarily a proponent of sea dominion in the traditional sense, is not a supporter of the idea of *mare clausum*. The continental power is a

sponsor of the doctrine of the open sea, *mare liberum*. Not only do "those who have no sea of their own" see nothing to gain in the idea of *dominium maris;* they see a possible obstacle to the activities of their own navigators and fishermen, and—decisive consideration—an obstacle which, lacking naval power, they could not dispute by force. Hence the demand for legal protection by a legal principle of open seas.[12]

This attitude the continental state will apply, of course, to all high seas, coastal waters, gulfs, bays, and straits. It will not necessarily extend this demand to the case of international rivers. A continental state, in the geographical sense, is apt to possess numbers of rivers which give access to neighboring continental states, and may well take the attitude, not uncommon in the history of the discussions concerning the freedom of the seas, that inland lakes and rivers are to be sharply differentiated from the open sea, and treated as parts of the land.[13] This is all the more likely to happen, seeing that the internal resources and means of communication of the continental state are its principal sources of power. Here the force of a general idea as applied in certain concrete circumstances may fail before the claims of special interest. This attitude is, however, not without justification in the accepted legal theory of maritime jurisdiction, as we have seen. It is, moreover, somewhat removed from the centre of the problem and does not suffice to alter our conclusions upon the general attitude of the continental state.

[12] Example: United States, 1789–1825; Brown, 163–193, and Fish, 196–199.

[13] Examples: South American states, 1820–1850; Moore, *Principles*, 130–134; France, at the Peace Conference in 1919; Baker, Vol. II, 431, 433.

On questions of belligerent rights at sea in time of war, the attitude which must be taken by the continental state, the state which is not, by definition, a naval power, is clear.[14] Not contemplating a situation where it would be in position to exercise extensively the rights of visit and search, capture, blockade, and so on, the continental state has no incentive to favor an extension of those rights. Having, probably, a considerable surplus of exportable foodstuffs and raw materials, and some merchant marine of her own, the continental state is, on the contrary, moved to favor freedom of trade at sea in time of war. Being compelled to maintain a large military establishment for defense of her extensive frontiers by land, she is likely to need greater military supplies in time of war than she can produce herself, and to desire, therefore, to be able to import such goods from overseas.[15] As this may involve, and be possible by means of, traffic through neighboring neutral countries, the continental state will demand the restriction of blockade to belligerent coasts, leaving her free to import goods through the ports of her neighbors. She will, of course, favor a restriction of the list of contraband goods for the same reasons.

One or two special angles of this situation demand attention at this point.

It will be recalled that the continental state has been so defined not so much by reference to geographical position and consequent economic and political interests as by reference to a normally correspondingly low naval power. It is the latter aspect of the case which is most pertinent here. It results in a situation where the states with low naval strength habitually assume an attitude

[14] Example: United States, except in times of war and until the creation of a large navy; Quigley, 55–74; Rodgers, entire.
[15] Example: Germany, 1914–1918; Garner, § 495.

of opposition to the great naval powers. As we shall see, this sometimes includes states which are, in geographical situation and in interests, very decidedly maritime states, but which do not possess powerful naval forces. For the time being such states are continentalist in their views. And the very fact that they possess extensive maritime interests serves to make them all the more dependent upon the restriction of belligerent rights at sea for their safety.[16] We then have the classical alignment of the weak demanding or pleading for liberty and safety against the powers and even the rights of the strong, the many minor naval powers resisting the few great naval states.

In the second place, the fact that relative naval power is decisive here indicates an underlying consideration which constantly influences the behavior of the whole group of states involved. The state resisting the extension of belligerent rights at sea, having a small navy, is without physical means to defend its interests against abuses at sea. It cannot convoy its vessels even if it could compel the assent of the great naval powers to the right of convoy, which might be doubtful. It cannot seriously threaten the great naval state with invasion or attack because the maritime state can only be invaded by means of the sea, which it controls. The minor naval power cannot seriously threaten to join in a war in progress because it is weak in precisely that department of war where alone a threat would be of importance to the maritime state, namely on the sea. It can only cry out against the tyrant of the seas, invoke the principle of maritime liberty—and consider the advisability of building a navy.

[16] Examples: Netherlands, the Scandinavian states; Brown, 95–99, 151–152, and Quigley, 25–29, on the armed neutralities of 1780 and 1800.

The implications of this situation reach back to a point of time prior to the outbreak of war. To a certain extent the procedure to be followed and the rules to be observed by belligerents and neutrals in war are proclaimed after the outbreak of war by the belligerents. In making proclamations respecting commodities which he will treat as contraband, in proclaiming blockades, and so on, the belligerent is, however, restricted by the rules of general international law already in existence. The neutral state has, moreover, always protested against individual belligerent action by way of altering or amending preëxisting general law. In any case it is to the preexisting general law that we must turn for the bulk of the rules in force in naval war. Now even here the weak naval power has little voice. The London Naval Conference of 1908–1909 was attended by only a few powers, all of them leading naval powers. As we shall see later, some of these were also continental powers, or, at least, shared the continentalist view of such matters.[17] But the most significant fact is the neglect of the non-naval powers.

The outcome of the conference, while it only concerns the naval powers which attended the conference, illustrates further the tendency under examination. It was felt possible to overlook important continental states in the drafting of the Declaration Concerning the Laws of Naval War,[18] and even certain states with wide maritime interests,[19] but that is not all. After the Declaration was drafted the weaker naval powers among the signatories,

[17] Examples: France, Germany, United States; "the nations which met at London were, in the main, great military nations"—, Baty, 24.

[18] Examples: China, Switzerland, Brazil; Garner, § 20.

[19] Examples: Denmark and Norway; same.

the states most interested in seeing the Declaration adopted, felt compelled to wait, before ratifying the Declaration, to see what Great Britain would do. And when Great Britain failed to ratify, the lesser naval powers refused likewise. This episode has already been referred to in another connection. It serves here to illumine vividly the way in which the weaker naval powers, and, *a fortiori,* the continental powers, are at the mercy of the great naval powers not only in time of war but in those very conferences where general international law is drawn. It may be inferred that protest in such circumstances would have little effect.

Furthermore, the continental state is under a vague sort of domination by the naval state in other respects in time of peace. That peace-time domination has been exaggerated. And the dominant naval power to-day would hardly dare, for all its power, to attempt to close the seas in time of peace as in times past, for this would probably provoke such concerted resistance as to lead to the defeat of such an effort. Realizing this, the naval power lets well enough alone, and loudly proclaims that the seas are free in time of peace and that the war problem is therefore the only problem outstanding. This is too strong; naval domination operates in time of peace in the writing of law for future wars, in the writing of laws of navigation, and the law of territorial waters.[20]

It will be recalled that there are several points in dispute to-day among students of the law of naval war. We may properly conclude our study of the attitude of the continental state by a review of the attitude taken by that state upon those points.

[20] Compare Balfour's views, as cited, with those of Young, G., "The Freedom of the Seas," in *New Europe*, Vol. X, p. 5 (16 January, 1919).

In the practice of visit and search the neutral continental state opposes the action of conducting a vessel to port for this purpose. In the eyes of the neutral state —in so far as the views of the latter are not colored by a thought that excessive belligerent rights may be convenient some day for its own use in the event of war— visit and search must be conducted as expeditiously as possible. In times past continental states have attempted to deny this right altogether. If the captor is compelled to take a risk in standing by during visit and search, that is a risk which he should assume, not the neutral. In general the principles held by the neutral as governing all belligerent action in time of war are: the neutral to be allowed to continue in time of war to act as in time of peace as far as possible; he is to be interfered with as little as possible; every interference must be clearly justifiable. The burden is ever to be placed on the belligerent. Hence the attitude just described regarding visit and search.

Regarding blockade the neutral demands that blockades be allowed only where they can be made effective, where they are clearly announced, restricted to belligerent coasts, and even that commercial blockades be given up entirely and vessels stopped from carrying goods to enemy ports only in case the goods are contraband, or the port be under actual attack by sea.

Regarding contraband the demand of the neutral is for a clear definition of what is contraband, in advance of the outbreak of war, by international agreement, such definition to include only commodities directly of use in war,—perhaps only arms and ammunition,—and not to be open to alteration by belligerents during war. A standard list of contraband should be accompanied by a statement of the conditions under which it, and the vessel on

which it is loaded, may be captured and condemned, and these conditions ought to be very severely restricted: contraband only to be seized when consigned to enemy governments, the vessel only when belonging to the same owners.

The neutral also opposes, in general, the right to convert merchant vessels into war vessels at sea, privateering, the right of angary, the right to use unanchored contact mines or contact mines at all, the destruction of prizes, the creation of war zones on the high seas, and interference with international mails and mail steamers. He demands the right to arm merchant vessels for defensive purposes, the right of convoy, and freedom to purchase merchant vessels from belligerents even after the outbreak of war.

When the continental power which has started on the way toward the creation of a navy is involved in war, particularly against a great naval power, these positions may be more or less modified, abandoned, or even reversed. In such a situation the continental-maritime state may be found speaking in the rôle of a naval power, pushing to extremes those very belligerent rights previously disputed, and thus furnishing weighty arguments to the maritime state proper in case of a later war.[21] This is not entirely surprising, however, because in her utterances in normal times the continental counts upon being neutral in time of war,—or at least in time of naval war,—that is, upon being able to wage war chiefly upon the land if called on to wage war at all. This is a normally safe calculation, and hence when the continental state is called on to wage a naval war, the result is likely to be rather anomalous, somewhat out of harmony with

[21] Examples: United States, 1861–1865; Germany, 1914–1918; Brown, 209–212, 227.

her true character, so to speak. Forced to compete on an unfamiliar plane, she is driven to seek rights she would deny to all others as against herself, such as rights of conversion, angary, privateering, destruction of prizes, the use of mines, and so on.[22]

Finally, when the continental state is at war, but is not waging naval war herself, but relying on her continental position and power entirely, she may proceed to the opposite extreme and demand that apotheosis of freedom at sea in time of war, the total immunity of private property from capture, including enemy property, but excluding—usually—contraband of war. Into the arguments adduced in favor of such a rule we cannot go here.[23] Suffice it to say that such a demand embodies more thoroughly than any other the opposition to belligerent rights at sea. The demand has the appearance or reproducing at sea the rule against general confiscation of private property in war on land. And with the exception of contraband it appears to leave the belligerent with all the power he needs: power to interfere with all property aiding in the war, the power exercised on land. It would restrict naval war to hostilities between enemy public vessels and between such vessels and land forces accessible from the sea. The reaction of the naval state to this demand, as well as to the whole general attitude of the continental state, neutral or belligerent, may now be examined in a separate chapter.

[22] They (the great military powers) have little to lose at sea and they have few ports in distant seas to which they can take their neutral prizes. Consequently, they wish to have the power to destroy them"; Baty, 24.

[23] Good brief exposition in Choate; more elaborate treatment in Quigley, 75–128, 178–192.

CHAPTER XI

THE POLICY OF THE MARITIME POWER

If we now return to the starting point of the discussion in the preceding chapter and attempt to define the maritime state according to the tests whereby the continental state was defined we shall be on safer ground. The continental state in a geographical sense is not, we saw, equivalent to the continental state in the sense in which that term is used in world politics, for by that term as used in international politics is intended a state with great power on land and little or no naval power, rather than merely a state with continental interests. The maritime state, on the other hand,—that is, the maritime state in a geographical and economic sense,—is usually the maritime state in the sense of international politics. As a result, the whole problem of freedom at sea appears somewhat simpler and more straightforward when viewed from the position of the maritime state.

The maritime state might, accordingly, be defined as a state whose principal interests lay in and about the sea. Such would be a state occupying an island or a peninsula, with long coast lines, many harbors, overseas colonial possessions, and a large merchant marine. Such a state would depend chiefly for its food and raw materials upon overseas sources of supply and upon overseas industrial states for its imported manufactures. It would seek overseas markets for its exports,—food, raw materials, and manufactures,—and be able to reach few if

any important markets by land transportation alone. It would, perhaps, be unable to absorb in the home market all its products, and therefore would have a considerable surplus for export. Its citizens would ordinarily be concerned in fishing and shipping to a great extent, and in more pretentious overseas business ventures, personal relationships, and financial activities, including foreign investments. The maritime state and its people would be concerned mainly, if not entirely, in overseas activities.[1]

A state all of whose interests lay overseas, or on the sea, would be hard to find. No state, however extensive its maritime interests, but has a certain amount of internal trade by land, a certain amount—often a vast amount—of domestic manufacturing industry, on the productiveness of which, indeed, the overseas interests of the state may be largely based. In fact, it may be said that, while a purely continental state is at least conceivable, a state such as would have no interests in the sea of any importance, we cannot conceive of a state where all the interests of the people would lie upon or beyond the seas. They must at least dwell upon the land.

Nevertheless, it remains true that, in the main, the maritime state of international politics is more nearly the maritime state pure and simple than is the continental state of international politics a purely continental state. There are, it is true, fewer maritime states pure and simple, and fewer powers which are even primarily maritime states, than there are states predominantly continental in character. But—what is more significant here—there are, or have been, two or three great states in the course of international politics whose interests and activities have been almost entirely maritime in character,

[1] Examples: Great Britain, Japan, Italy(?); *Statesman's Year Book*, 63–85, 1068–1072, 1039–1045.

in contrast to the very large number of first or second rate powers half continental and half maritime or powers mainly continental but possessing collateral maritime interests as well. The continental state seems very prone to develop considerable collateral maritime interests and activities,[2] while the maritime state does not ordinarily experience a corresponding development of collateral continental interests on her part.

The result is that the maritime state is usually discovered fully equipped to defend her interests by sea. The maritime state is not ordinarily in doubt about the necessity for a naval establishment sufficient for her needs. Hence the terms "maritime state" and "naval power" are nearly synonomous. For the sake of precision we may agree that where a discrepancy does appear between the maritime interests of a state and the naval power maintained in defense thereof, the test for use in the field of world politics is the latter. Just as in discussing "continental states" we were in effect discussing military powers or non-naval powers, so in discussing "maritime states" we are in effect discussing naval powers. But "maritime state" is far more nearly equivalent to "naval power" than "continental state" is to "military power."

The lack of symmetry evident in the situation just described is due in part to the fact that attention is here being deliberately centred upon the freedom of the seas. After all, we are not discussing international freedom on land or international freedom in general, but maritime freedom. For deliberately taking that viewpoint at the start there seem to the continental state ample reasons.

[2] It has been said that "the modern tendency is for all great powers to be sea powers as well as land powers and that the old sharp contrast between land powers and sea powers is gone"; Hurd, *If There Were No Navies*, 14.

After all, it is most natural for people to live on the land. That is where most of them live. Land power is therefore natural and inevitable. Continental states are surrounded by possible invaders more closely than are maritime states; if the latter must create navies for defense the former must equally well create armies. And the latter are made out of the natural resources of a state, its people, conscription or no conscription. An army is a better gauge of national power than a navy, which is an artificial thing, and gives power beyond its due proportion. The position of the land power is the normal one. What more natural than that the preponderance of relevant practice and evidence should, therefore, be found all on one side?

And yet the phenomenon is due to something less theoretical than this, to a fact of historical state life which must be brought to light sooner or later as the principal source of the contrast between continental and maritime powers. That fact is this: naval power is not, and cannot be made to be, effective on land, while military power, if coupled with naval power, may be effective overseas. When we remember that the continental state starts with an army and then adds certain increments of naval power, while the maritime state is likely to rely upon naval power alone, we may perceive the cause of the bias of emphasis in the problem: the maritime state is committed to action solely or chiefly in a field where all states, even the continental military powers, manifest some strength, and remains weak where the continental state is naturally strongest. This is the obverse of the situation wherein the continental power with subordinate maritime interests is compelled to allow the naval states to dictate the law of the sea. The resultant alignment is a source of real fear and anxiety on the part of the naval state quite

equivalent to the resentment—without real fear—of the continental state at the dictation of the naval powers in the field of maritime law. Further consequences of this situation will appear later.

These things being as they are, it is unnecessary to describe in detail the typical maritime state, as contrasted with the purely maritime state.[3] We saw that a purely continental state would have no interest in, nothing to say upon, and no influence over, the freedom of the seas. The purely maritime state would have much to say on the subject, however, and we need not at this stage pause over the leaser degrees of attention given to the subject by less exclusively maritime states. If we did, we should find ourselves working back over the same list of quasi-maritime, quasi-continental, powers already described. The result would be a list of states running down from completely maritime states, through mixed types, to completely continental states.[4]

The feeling that what was decisive in this question was power, not interest, which made its appearance in the discussion of the continental state, reappears at this point. There is, moreover, greater justification for the feeling

[3] It should be recalled that certain maritime states have special or local problems of their own to deal with which color their policies profoundly. Thus Italy is a maritime state and hence very sensitive about naval power in the surrounding seas, but she is hardly interested at all in conditions outside of the Mediterranean; Coppola, "Italy in the Mediterranean," in *Foreign Affairs*, Vol. I, No. 4, p. 105 (June, 1923). The Baltic states, again, are interested in the Baltic; Russia and France have special interests in the Black Sea and Mediterranean, respectively. Britain has naval interests in all the seven seas. On a rumored Mediterranean League between England and Italy see *New York Times*, 27 July, 1923.

[4] Example: Great Britain, United States, France, Russia, Switzerland; *Statesman's Year Book*, 63–85, 486–507, 880–886, 1256–1260, 1342–1345.

here. What is speaking here is naval power primarily. Great naval power, or greater naval power. Upon reflection it soon becomes obvious that we are dealing not with a case of sea-interests against land interests, but with a case of navy against navy, and big navy against little navy. The minor maritime state receives, as we saw, little attention in the drafting of sea law. Minor naval powers fare little better than their military friends. Indeed, at many points the minor naval power is compelled to take sides with the continental powers for tactical considerations.[5] But the great naval power always speaks in the same rôle. For the great naval state has a single aim and a single method. It knows what it wants and it believes that it knows how to get it. With a great navy, it writes the law of naval war; with a great merchant marine, it writes the law of navigation.[6] Concessions to the principle of common consent it makes few. The naval power rules the sea and fully intends to do so.

Before passing to a review of the attitude of the maritime state on the details of maritime law it will be well to note still further a peculiarity of maritime states which at times distorts the normal effect of their interests and powers. Just as many continental states with rapidly developing maritime interests neglect to create naval power commensurate therewith, and remain continentalist in outlook when in interest they are becoming largely maritime, so naval states tend to preserve their original character and attitude after changes which destroy their maritime interests. Once a great naval power, a state is reluctant to retire from that rôle, even after the decay

[5] Example: United States at the London Naval Conference; *Proceedings*, 8–16, 234, 272, 290.

[6] See the history of navigation laws as briefly described in *The Scotia*, 1872, 14 Wallace 170; also Meloney, entire.

of a once flourishing fishing or shipping industry, the decline of the national merchant marine, or the loss of overseas colonies.[7] This is all the more likely to happen inasmuch as in such cases there is no rapidly developing continental interest to absorb the attention and wealth of the state. The state does not face the choice of shifting from the status of a naval to that of a military power, but rather the danger of slipping back generally among the second or third rank powers, and this is shunned at all costs. Only when absolutely forced to do so will the once powerful naval state surrender that proud position. For so long as naval power is preserved the naval state may speak with the mighty, even if this does not satisfy any national interests beyond the matter of prestige. It enables the otherwise negligible state to assist in the drafting of maritime law along with the great powers.[8]

The naval or maritime state, having extensive coast lines and numerous bays and harbors will be interested in asserting as vigorously as possible the doctrine of maritime territorial jurisdiction. It will demand authority over its marginal seas and its semi-enclosed bays and gulfs, ports and harbors. It will be interested in the wealth to be obtained there by fishing and coastal trading. It will feel the danger attendant upon allowing aliens and alien vessels of all nationality to enter and utilize those waters. It will, finally,—unconsciously perhaps, but inevitably,—feel entitled to enjoy such authority because of

[7] Examples: France, Spain, Netherlands(?); *Statesman's Year Book*, 880–886, 1306–1311, 1130–1135.

[8] Example: Netherlands at London Naval Conference, *Proceedings*, 124. The invitation to the Netherlands was issued, after the principal Powers had been invited, ostensibly on the ground that The Hague was to be the seat of the International Prize Court; the influence of the other consideration was evident in the scene, however.

its naval power, whereas, as we have seen, control from the shore, an action which the continental state with its heavy fortifications and long-range artillery would be in a position to perform better than the maritime power, is the basis of such authority, not control by naval power. The naval state may even be moved to put forward a claim based frankly on sea-going naval power, which would, of course, lead, if accepted, to a more or less complete occupation of all the seven seas. This is all the more possible and plausible because of the fact that a state may, as we have seen, employ naval power for the enforcement of its authority in territorial waters, even if the latter must be originally defined by another test.

In one sense, however, it may be said that the naval power is inclined to pay less attention to the law of territorial waters and the right of jurisdiction therein than are some other states. The continental state, we saw, is solicitous on this point particularly because the principle of free use is its sole reliance, failing which it cannot rely upon naval power to assert its interests. The naval state, on the other hand, feels confident of being able to defend itself in its territorial waters at any time, by force if need be. It is in a way superior to the law, international politics being what they are, and the international machinery for the definition and enforcement of international law being as defective as it is. It is sometimes true, therefore, that the most vigorous assertions of maritime sovereignty come, not from the great naval states, who have sea control and can afford to neglect the legal approval of their fellows, but from those quasi-maritime states which, while aspiring to naval rights, as yet have not the force to make sure their authority over neighboring parts of the sea.

This phenomenon is observable in another situation.

The weak naval power, principally continental in interest but now involved in naval war, will be prone to claim rights of naval war with which the great naval power can afford to dispense, rights which in effect tend further to destroy the freedom of the seas. The weaker naval power, having a small navy, few bases of supplies, and few ports into which prizes may be carried after capture, will often be found demanding a right to use privateers, to requisition neutral vessels and cargoes not contraband of war, to destroy prizes, to carry captures to port for visit and search, to sow automatic contact mines on the high seas, cut cables, sink merchant vessels at sight, convert prizes into war-vessels on the high seas, and so on. And all in the name of the freedom of the seas. There is nothing incomprehensible in this. It is at times necessary to kill to save life, to oppress in order to liberate. The only question in such cases is whether the ultimate object of maritime freedom is really being sought after or not, and whether it is worth the price to the family of nations at large and especially to those paying the price.[9]

In the end, to return to the main line of thought, the maritime state may be discovered standing as far over in the direction of maritime freedom as the continental-maritime state may go in expanding maritime rights in time of emergency. Once having agreed to a principle of free use, the maritime state is precisely the state most interested in seeing that principle accepted generally by other states. Having such extensive territorial waters

[9] Would Norway have gained more by allowing Germany to break British maritime domination by free use of the submarine against neutral merchant shipping; was Germany really aiming at the destruction of that domination—and nothing beyond—or the substitution of her own for British domination?

of its own, being so much under scrutiny for its behavior in the regulation of these waters, the maritime state cannot evade obedience to the accepted rule unless it is willing to adopt an attitude of sheer defiance. It has, moreover, surrendered its monopoly privileges in its own waters, and it boasts an extensive merchant marine which can only be operated to full advantage by a free use of all the territorial waters of the world. Once having adopted the rule of freedom at sea in this particular, therefore, the maritime state is bound to insist upon its adoption in that same particular by all other maritime or quasi-maritime states. The perfect example is found in the action of Great Britain after 1650, in contrast to her earlier attitude. British partisans (not of Selden's age) picture the freedom of the seas as being won for the world from Spain by the defeat of the Armada in 1588: "it was established by the British Fleet and it has been defended by the British Fleet from generation to generation against all the forces of reaction." [10] The significant phenomenon that relaxation of formal British claims to sea-dominion has not meant, until recently, any relaxation of British efforts at sea power, is also to be remarked.

Closely connected with this development is the characteristic attitude of the maritime mercantile state toward piracy and the slave-trade. The maritime state may be a great slave-trading state itself originally. But once having abandoned the slave-trade the maritime commercial and shipping state is bound to favor its abandonment by all other states, lest they reap the profits now by it foresworn, and this may take the form of a demand for a right of visit and search in time of peace for use in

[10] Hurd, "The Freedom of the Seas," in *Fortnightly Review*, Vol. XVIII, p. 687; see, in general, Hall, 148–152.

the suppression of the slave-trade.[11] British partisans often picture the beneficent activities of the navy since Trafalgar thus: "the navy has put down piracy, suppressed the slave-trade, brought help and succor to those in distress and enforced law and order in every part of His Majesty's Dominions (sic!)."[12] In such a case the cause of freedom at sea is served and injured at one and the same time. So far as the maritime slave-trade is abolished the individual negro or slave is freer upon the sea than otherwise, while the ship-owner and trader is more closely supervised and his right of free navigation at sea impaired. As things actually work out this right of search is—and could be—based only upon voluntary and reciprocal concessions by interested states, so that the net result is entirely favorable to essential freedom at sea.

As for piracy, it must be obvious that the maritime state of modern times will inevitably favor its suppression.[13] In former times the maritime or naval state was often herself a pirate state, and favored the retention of that variety of freedom upon the sea which made piracy possible, namely, freedom from police control. War was a chronic state of affairs, and naval war, war as waged constantly by the great naval powers, was close to piracy. In our day, however, with peace the normal state of affairs, the great maritime state favors the policing of the sea against pirates, because of its extensive merchant marine and its interest in free and safe navigation to all

[11] Example: Great Britain after 1807, especially in 1814–1820; Brown, 169–171, 180–182, Du Bois, § 68 and Moore, *Principles*, 115–119.

[12] "The Freedom of the Seas. A Conservative View," in *Living Age*, Vol. XII, p. 655 (14 December, 1918).

[13] Example: Great Britain in last two centuries; Brown, 172–173.

the ports of the world. This means a denial and destruction of that primitive freedom which existed prior to the establishment of maritime police arrangements. Here again, however, such arrangements can only be made on the basis of voluntary reciprocity, and the principle of equal or common rights in the use of the sea is preserved, except as respects the pirate himself. Inasmuch as the latter is denied legal protection by his own state if he be a citizen of any state, and inasmuch as he cannot be considered in any light by international law if he is not a citizen of any state, the problem can hardly be dealt with from his standpoint. For the legitimate trader the activity of the great maritime state in suppressing piracy makes all for freedom.

When the question of the use of international rivers is raised, the maritime state, situated upon an island or a peninsula, having few or even no international rivers of its own to guard, and having a large merchant marine for use in trade with foreign countries, may well support the principle of free navigation in such rivers. Of course, a continental state of such extent and configuration as to possess rivers which touch at all points only its own territory would be in like position. This is bound to be an infrequent occurrence, however, for most continental states will possess international rivers and only island states will ordinarily be without them.[14] And then the rôles of the maritime and the continental state are reversed. What is tactically more important, the continental state, urging so strongly the principle of free navigation for marginal seas, bays, straits, and so on, can hardly resist the demand for open rivers when thus

[14] Example: United States, where the Colorado and the St. Lawrence are two important exceptions; Rand McNally, *Atlas*, 9.

put forward by the island state. In a certain sense it might be said that this is a freedom on or through the land which the continental state is asked to concede in exchange for the right of passing freely on or through the coastal waters of the maritime state.[15]

From what has just been said, it is obvious that, viewed in its entirety, the position of the so-called maritime state might be regarded as very ambiguous. At once the supporter of the idea of maritime territorial jurisdiction and the opening of continental rivers, what can be said to be the real or true position of the maritime state on the question of the freedom of the sea? This difficulty is accentuated upon notice of the fact that a far-flung imperial state, a continental state with overseas colonies, or an insular state with continental colonies, may well be partly continental and partly maritime in geographical structure.[16] In such a case the mother country or metropolitan government may take one position in reference to one set of questions, and another where questions relating to the colonies are concerned. More frequently the result will be that the colonies and the mother country will disagree on such matters. Add to this the ambiguous position of the continental state in certain situations, as already reviewed, and it may well appear that the idea of the freedom of the seas as a whole is entirely intractable, confused, and meaningless. The answer has already been suggested, but may be repeated here. What we have to deal with is naval power or military power, rather than maritime or continental states, or, at the most, states or parts of states speaking in one rôle or an-

[15] Examples: Britain and France at the Peace Conference in 1919; Baker, Vol. II, 431, 433.

[16] Example: British Empire; *Statesman's Year Book*, 63–85, 141–156, 223–229, 299–309, 365–371, 440–446.

other, at one time or another, in one or another situation of fact. In the long run such divergences as those just reviewed will not destroy the value of the classification adopted, and care must be taken merely to allow for such possible divergences in special circumstances.

The position of the naval state with respect to belligerent rights at sea is relatively simple.[17] Such a state anticipates that, in view of its world-wide interests, commercial and colonial, it is liable to be drawn into any general war which develops among the major powers. It anticipates that it will seldom be neutral in case of wars at sea. It realizes, moreover, that it must itself wage war principally upon the sea, or overseas, if it be called on to wage war at all. For its opponents will lie overseas, will have to be attacked upon the sea or across the sea, by means of overseas expeditions supported by naval forces, and they will in turn attempt to attack by naval expeditions. It is accessible overseas, as the continental state is not accessible overland, by all other maritime states in the world; the surrounding sea if uncontrolled is a source of weakness, an open door to all naval powers. At the very least the maritime state will have to defend its coasts from bombardment and invasion—this is the original reason for its large navy—; it may also have to defend its commercial vessels and neutral vessels coming to its ports from attacks at sea. Finally, having no large army and not contemplating the recruitment or use of an overseas expeditionary force in every case, such a state desires to have the means of attacking the enemy through his commerce, by capturing his commercial vessels, even sinking them, if need be, and, in general, of waging the war as vigorously as possible on

[17] Example, applying from here to end of chapter: Great Britain; see, below, Chap. XII, at 224–225.

the sea against enemy commerce and shipping. The naval state is bound, therefore, to urge the retention and even expansion of all the historic belligerent rights at sea—visit and search, blockade, and the rest.

We may observe here one of the most striking paradoxes in international law and politics, a paradox which is directly connected with the very tap-root of the present disposition of the freedom of the seas. The maritime state, island or peninsula, dependent largely upon overseas sources of supply for food and other necessities of its economic life, might be expected to be most peculiarly concerned in free and safe transportation at sea in time of war, and to oppose, therefore, the extension of belligerent rights over commerce at sea.[18] The island kingdom which cannot support its own people without imported food should logically be the state above all others to desire a restriction of rights of visit and search, blockade, capture for carriage of contraband, and so on. In actual fact it is commonly the most vigorous supporter of those rights.

The explanation is found in the fact that the island kingdom, the maritime state, being so completely dependent upon imports for food and other supplies, and realizing, as any state compelled by such a situation to reflect on the matter must realize, that it cannot rely on the protection of abstract international law, because of uncertainty in regard to the exact provisions of the law, misgivings as to how well it will be observed by enemies under stress of war, and lack of an international author-

[18] The island state, if neutral, may see its large commerce suffer until it were even safer to ship under the flag of the (dominant) belligerent; if belligerent its supplies are in danger, and its communications, while the continental state is not so jeopardized; Baty, 93.

ity to enforce the law, feels more security in defending itself on its own naval power.[19] The possible protection of the law being so unreliable, it feels compelled to maintain a navy capable of preventing the enemy from invading its shores or interfering with its import trade even though he is conceded the right to do so if he can. The shipping people want naval protection, not paper protection, and they demand naval expansion for that purpose. When this movement coincides, as it does, with the necessity for maintaining a navy to prevent invasion over the sea the path of action of the maritime state becomes doubly clear. And, not being able to rely on legal limits upon interference with imports by the enemy, but conceding him that right at law, the maritime and naval power accordingly desires to exercise that right in turn against the enemy, and obtain a maximum of effect in general international relations from its naval equipment. This is a natural and justifiable desire. But it carries the naval state over on the offensive. The circle of motives is complete. The result is completely to reverse what might be expected to be the attitude of the maritime state, and to make the latter the strongest supporter of the law of capture, and the supporter who, because of physical power at sea, can block any attempts by continental states to destroy or limit that right.[20] This is the centre of the political problem of the freedom of the seas in time of war.

Of course, things may change. As has been observed by one acute student of the British situation, so long as

[19] "Some pin their simple faith to the Navy and airily waive all these questions (of interrupted communications) aside with the Union Jack"; Baty, 94.

[20] "The Freedom of the Seas, A Liberal View," in *Living Age*, Vol. XII, pp. 656–659 (14 December, 1918).

Britain pursues the policy just described it is true that "if the navy is omnipotent we can do as we like; if it is not supreme at sea we are ruined."[21] Any state with wealth can build or buy naval equipment—which comes mainly from the land; and seamanship is not a monopoly of any race. More important still, the development of the submarine may so challenge the supremacy of the fleet that England, with her large merchant fleet and overseas interests, may find it to her advantage to "flop" to a demand for the immunity of private property at sea, abandon her battleship and cruiser equipment and herself rely on submarine defense (she is now building rapidly in this direction). The continental states, hitherto having no great navies and having supported that ideal, are now building submarines and opposing immunity, preferring to have that means of attacking England.[22] After two centuries of opposition to the treatment of food as contraband they are turning to a desire to adopt that treatment; England is now dependent on overseas food and they are not.[23] But pending a complete reversal of sea-power the old alignment of power and interest holds good and we must discuss the problem in that light.

In detail the naval state stands for full use of the right of visit and search—perhaps even in spite of neutral convoy—for a right to establish and enforce commercial as well as military blockades, to capture and condemn enemy merchant vessels and cargoes, and neutral goods when contraband as also the neutral vessel carrying contraband. The naval power is inclined to adopt and attempt to enforce its own rules as to what constitutes contraband, what constitutes enemy destination and—for alleged en-

[21] Baty, 94.
[22] Hays, 287.
[23] Baty, 56.

emy vessels and cargoes—what constitutes enemy character. This power is likely to attempt to apply the principle of continuous voyage not only in connection with contraband, absolute and conditional, but also in connection with blockade. It will oppose and attempt to disregard all transfers of enemy merchant vessels to neutral flags after and just preceding the outbreak of war. In every way it will attempt to secure recognition by the nations of belligerent rights of supervision over commercial shipping in time of war, and, failing this, will often act upon its own conceptions of right in the premises; and plead belligerent necessities as defense. And when fully exercised sea power seems to be able to control land power by these means; "the sea controls the land." [24]

It is only fair and accurate to notice, however, that at some points the great naval power is more moderate in its actions and its claims for belligerent rights than the continental or minor naval power which is unexpectedly called on to wage war upon the sea. The great naval power, having an adequate force of fighting ships, of auxiliary supply and transport ships, and a considerable merchant marine, a considerable proportion of which will be found in home ports in time of war, from which under purely domestic law she may requisition additional supply vessels, will be able to dispense with privateering, the use of mines, the right of angary, conversion at sea, and other rights which may promise great help to the lesser naval power in time of war. Further, it will actually oppose the recognition of such rights in the name of freedom of the sea. It will claim that such methods only tend to impair the safety and freedom of life of

[24] Hurd, *If There Were No Navies*, 5–6.

sea-faring people without commensurate advantage to the belligerent employing them, that they tend to lower the plane of naval war, render it irregular, informal, chaotic. Having numbers of naval ports in its colonial possessions, it will oppose destruction of prizes; it does not need that right itself, and by insisting upon adjudication or release as alternatives in the treatment of prizes it can hope to lower the number of effective captures by the enemy, or, at least, to increase its own chances for making recaptures. It will oppose, probably, the right to arm merchant vessels in time of war, being confident of its ability to defend its own merchant shipping, and not desirous of having itself to deal with armed enemy merchant ships. It will likewise oppose the claim to take merchant vessels into port for visit and search, expecting to be able to keep the seas itself and carry out searches there by means of its cruisers. Of course, a state which is presumed to be a dominant naval power may be confronted by a naval attack so unexpected and so effective as to compel it to reverse its position on these points,—to adopt the position of an inferior naval power.[25]

Finally, it may be noted that, faced by the hostility of neutrals to the activities of its cruisers in capturing, and its prize courts in condemning, their merchant vessels, the naval power may be led to adumbrate a solution of the problem of reconciling belligerent rights and interests with neutral commercial rights and interests which goes beyond anything ever hoped for in the way of an extension of belligerent rights, and yet appears to save the neutral much loss of life and property. Thus, if the dominant naval power were allowed to formally supervise neutral trade, and to license, as it were, certain kinds of

[25] Example: Great Britain, 1914–1918, in the face of the submarine attack; Garner, §§ 500, 511–517.

trade, on the understanding that only such trade as was permitted would be attempted, and that it would not, on the other hand, interfere at all with such licensed trade, the interests of both parties might be served with maximum satisfaction. All the losses and destruction and the incidental irritation growing out of the present method of allowing neutrals to attempt such trade as they feel they can carry on without forcible interference by the belligerent, and allowing the latter to forcibly prevent such trade if it can, might be avoided.[26] Obviously, however, such a solution would revolutionize the law and the theory of belligerent and neutral relations, and we must leave the plan for full discussion along with other suggestions for the solution of the general problem of the freedom of the seas to the next chapter.

[26] Example: Allied rationing of Northern European neutrals, 1914–1918; Garner, § 503.

CHAPTER XII

THE SOLUTION OF THE PROBLEM OF THE FREEDOM OF THE SEAS

The permanent solution of the problem of the freedom of the seas lies in international organization, in a League of Nations for the definition and preservation of national rights upon the sea. Such a statement, however, is at once too simple and too complex. It is too simple in pretending to deal with various aspects of the problem under a single formula, too complex in assuming that all will perceive the various relationships which may exist between maritime freedom and international organization. To correct these faults in the statement given, to complete the analysis of the problem begun in the past two chapters, and to state the problem as it stands to-day, in the middle of the year 1923, is the object of this final chapter.

The solution of the problem of the freedom of the seas must be sought along three lines, in terms of law, of policy, and of power. To each of these let us now turn. What is the freedom of the seas to-day; what ought it to be, as a matter of policy, national or international; what can it be, for individual nations and the world at large, the existing distribution of power being what it is?

As was said at the beginning of this work, the actual freedom of the seas, in the most objective and literal and legalistic sense of that formula, is that measure of maritime freedom allowed by international law at the present time.[1] In that sense the freedom of the seas is not a

[1] Above, Chap. 1.

subject for contention as to what it ought to be or ought not to be; nor of speculation as to what it can be; the freedom of the seas in that view of the question is just what it is at any given time under accepted law, and the only room for disputation is found in the scientific effort to discover what the law is at that time. Such an effort was made, in subsequent chapters, to state the law as it existed in 1914, and to indicate the affect of the World War upon the freedom of the seas considered as an actual measure of liberty under established law.[2]

It is obvious, however, that such a view of the situation is very restricted. It would avoid disputation and reduce the problem to one of pure science at the expense of realistic truth. Moreover, it was soon discovered that, even when so viewed, the problem is not wholly simple. For the scientific task of discovering just what is accepted international law at any moment is an exceedingly difficult task. No adequate study has anywhere been made of the scientific problem of proving a point of international law, despite the numerous incidental references to that problem in treatises on international law in passages dealing with the sources thereof. It is not a simple matter to say what was ruling law regarding inshore anchorage or the destruction of prizes in 1914; it is still more difficult to say what is ruling law upon those points to-day. Hence, even in this narrowest sense of the words there is an unsolved, an unsettled, question of at least legally defining the freedom of the seas.

The only path by which this most immediate aspect of the question can be authoritatively treated is the path of international conference and the conclusion of a treaty or convention codifying international maritime law. In

[2] Above, Chaps. 6–9.

other words, by international legislative organization and practice, by international statutory action. Private codification and national codification are inadequate because private and national in character. If the principal maritime powers were willing to create an international prize court and trust it to hear, on appeal from national prize courts, prize actions there instituted, and to do this on the basis of customary law, special agreements existing in treaties in force between the parties, and general considerations of equity and reason, we might secure in the long fullness of time an authoritative definition of the actually existing freedom of the seas by the method of judicial determination. As shown in 1907, the nations will not trust any international court to this extent.[3] The remedy is now what it was then, as was seen by the eminent jurists called upon in 1920 to draft a plan for the new international court under the League of Nations.[4] Another London Naval Conference must be held, another Declaration of London—of much wider scope—drawn, and such a code finally ratified and accepted if the purely legalistic problem of the freedom of the seas is to be adequately disposed of.

What might have turned out to be the beginnings of such a process were taken at the Conference on the Limitation of Armaments held in Washington from 12 November, 1921, to 6 February, 1922. In connection with discussions which arose in that conference concerning the limitation of naval armaments and the employment of new agencies of warfare the leading naval powers present agreed to create a commission of jurists to consider the effect of recently developed agencies of warfare on the laws

[3] Above, Chap 9.

[4] Resolution I of the Advisory Committee of Jurists, in *Document* 44, League of Nations, First Assembly, at 64.

of naval war and to recommend any changes necessary in view of this situation.[5] That commission met at The Hague on 11 December, 1922, under the Presidency of the first American delegate, and proceeded to its task.[6] Inasmuch as the whole range of the law of naval war is affected by the appearance of the submarine and other new agencies of war, one would have assumed that the commission could hardly have avoided a complete review of the law of war at sea. On the other hand, the commission was not called upon to deal with the maritime law of peace, or the law of territorial waters. Nor could it take final action on the questions confided to it for study. Final action in these matters must be taken by the states themselves. What is still more serious, however, is the fact that, by a broad interpretation of another Resolution of the same Conference, warning the jurists not to review or report upon the rules or declarations relating to submarines or the use of noxious gases already adopted by the Conference,[7] the Powers betrayed—for reasons best known to themselves—the apparent object of Resolution No. 1, and instructed the jurists to confine their attention to aërial warfare and radio-communication. The jurists accordingly did so, it being thus brought about that Resolution No. 2, as interpreted, nullified Resolution No. 1. For the subjects of aërial warfare and radio-communication might just as well have been brought forward independently as in a naval conference. And, while the report of the jurists may lead to a new code on these subjects,[7a]

[5] Resolution No. 1 of the Conference on the Limitation of Armament, Adopted 4 February, 1922; *Conference on the Limitation of Armament*, 124.

[6] *New York Times*, 12 December, 1922.

[7] Resolution No. 2 of the Conference, in *Conference*, 124.

[7a] For text of rules recommended see *New York Times*, 23–24 June, 1923.

the need for a general naval conference to review and codify the whole of maritime law—relating to peace as well as war—therefore remains. When such a conference can be hoped for is uncertain, although there is now some suggestion of an international conference at The Hague in 1923–1924, under the League of Nations, and in connection with the Permanent Court of International Justice, to recodify the whole of international law, maritime law included.[8]

To resume and conclude our treatment of these matters, therefore, we may now once more recall the task of the future naval conference, the technical problems it must face,[9] and the interests and influences which it must conciliate.[10]

In the law of territorial waters there are some six or eight major problems demanding treatment.[11] These include the definition of the width of the marginal belt; the closer definition of the degree of authority to be exercised within that marginal belt; the legitimacy of acts of authority just outside, but closely adjacent to, that belt; the classification, by name, perhaps, of bays as closed or open bays; the treatment of the straits at Constantinople, of European international rivers given special status for a limited period under the treaties of 1919–1920, and of certain interoceanic canals. An attempt has been made in the two preceding chapters to indicate the considerations involved, on one side and another, in these questions, and the different attitudes which may be expected from different states. Some further notice may be taken

[8] *New York Times*, 10 June, 1923.
[9] Above, Chaps. 6–8.
[10] Above, Chaps. 10–11.
[11] Above Chap. 6.

here of the present status of the three items named last above.

An effort has been made in the years 1922–1923, at the Lausanne Conference on Near Eastern affairs, to provide a new régime for the Straits (the Dardanelles and Bosphorus) which shall conciliate the interests of both the states locally interested and also states more remote in situation and possessed of a merely general interest in navigation in the Straits.[12] This is one of the oldest and most difficult problems of modern international law and politics.[13] It is hardly possible to define the legal status of the Straits as of June 1923, under past international practice and treaty agreements, in view of the continuous *bouleversements* of the past nine years. It is difficult or impossible to define with assurance even the alignment of military and naval power in control of the Straits at this time. From the sixteenth century onward Turkey claimed the right to close the Straits to all vessels of all nations at all times. In 1774 Russia compelled her to begin to open the Straits to merchant vessels, but down to the time of the World War Turkey denied the right of passage of war vessels except under special treaty agreements. And her military power over the shores of the Straits, her reasonable need of protection for Constantinople, and her ability to prevent the Western Powers from combining to wrest from her the right demanded, enabled her to maintain that position. That situation was reversed by the Allied victories of 1918. The treaty of Sèvres, signed

[12] Great Britain, *Parliamentary Papers*, 1923, Turkey No. 1 (Cmd. 1814), being *Lausanne Conference on Near Eastern Affairs*, 1922–1923; and *New York Times*, May, 1923, and following.

[13] On the history of the problem see Phillipson and Buxton, 17–223.

with Turkey at the end of the World War, accordingly provided (1920) an elaborate reorganization of authority at the Straits, including equality and freedom of innocent navigation for all vessels of all nations at all times, and a "Commission of the Straits" empowered to supervise the operation of these provisions.[14] But this treaty had, by 1922, largely gone into the discard.[15] With the failure of ratification of the Treaty of Sèvres and changes in the positions and influence of some of the parties interested, it became necessary (1922–1923) to provide new arrangements, resembling those of the Treaty of Sèvres but making greater concessions to Turkish and other interests or demands.[16]

Briefly, the Turks began in 1922 by demanding substantially complete control of the Straits, while hiding this position in many words and professing a willingness to agree to the principle of the freedom of the Straits.[17] Although surrendering the old claim to a right to exclude merchant vessels or charge tolls for passage (and this phase of the question has now dropped out of the discussion), they claimed the right to exclude all foreign war vessels at all times, and to fortify the Straits.[18] In this they were supported and urged on by their quasi-allies the Russians, admitted to the Conference only because of their interest in the Straits problem.[19] This de-

[14] Treaty of Sèvres, Arts. 37–61.

[15] *Current History*, Vol. XVII, No. 1, 34 (October, 1922); *New York Times*, 24 September, 1922.

[16] *Current History*, Vol. XVII, No. 2, 187 (November, 1922).

[17] *Lausanne Conference*, 127, 156–159, 268–271, 280–284, 449–450, and *Current History*, Vol. XVII, No. 2, 186, 189, 281 (November, 1922).

[18] *Lausanne Conference*, as cited; also *Current History*, Vol. XVII, No. 4, 531 (January, 1923), and *New York Times*, 5 December, 1922.

[19] *Lausanne Conference*, 128–131 (cp. Curzon's reference to

mand was resisted primarily by Britain, but also by France and Italy, and, notably, by the United States.[20] The latter powers have demanded the right to send into the Black Sea in peace and war naval forces at least sufficient to defend their commercial and diplomatic interests there and interests located elsewhere but capable of being promoted by action there. They are willing to admit the exclusion of all enemy war vessels when Turkey is at war. They claim, however, that the Russo-Turkish solution would simply give Turkey and Russia, particularly the latter, complete naval domination over the Black Sea, its commerce and its littoral ports, including even the Bosphorus and Constantinople itself. It would, moreover, put all adjacent states at the mercy of Russian armies by land, foreign powers not having any means of supporting them by expeditionary forces overseas. If Constantinople were to be the Turkish capital, the Turks might feel it necessary for the safety of the city to secure recognition of a right on their part to exclude, and to attempt effectively to exercise that right and by physical power actually to exclude, all foreign war vessels from the Straits.[21] But if, as seems probable, the Turkish capital is to remain at Angora, then the need of protection is much less, and applies only to the shores of the Straits and the Black Sea coast of Anatolia. And on that point Turkey has little greater interests than Bul-

the Russian attitude, on 133), 148–149, 159–163, 236–238, 239–240, 271–274, 450–451; also *Current History*, Vol. XVII, No. 4, 532 and 535, and *New York Times*, 7 and 19 December, 1922; also *Current History*, Vol. XVII, No. 2, 188 (November, 1922).

[20] On demands of the Allies and the United States, and grounds for same, see *Lausanne Conference*, 138–148, 151–154, 243–250, 263–268; also *Current History*, Vol. XVII, No. 4, 535, and *New York Times*, 7 December, 1922.

[21] Turkish Nationalist Pact, Art. IV, in *Lausanne Conference*, 127.

garia, Roumania, and Russia, with their extended Black Sea coasts. The net result, in default of naval disarmament by Turkey and the states last named, would be to place the weaker of those states under the naval domination of the stronger, namely, Russia. Similar Russian proposals regarding the Baltic during the same period indicate that the Russians are either very naïve or very deliberate in their plans concerning maritime dominion on these interior seas.[22]

The Russsian aim in all this was partly that to which allusion has just been made. The Turkish aim was mainly one of preventing British naval domination in the Straits and the Black Sea. The only way by which this result could be avoided with certainty and still avoid playing into the hands of the Russians, would be to secure a neutralization of the Black Sea and the Straits in their entirety, leaving only certain international patrol vessels in existence there to suppress piracy and enforce the rules agreed upon for the use of the Straits. Such a solution would leave other nations without the weapon of naval force to protect their interests in those waters, however, and while it may be desirable to deprive them of weapons for pressing imperialistic adventures against the Straits and Black Sea regions, it is hardly desirable to deprive them of all power there, in the absence of adequate international police force, and with international rivalry still tacitly approved by public law. Moreover such an arrangement when attempted once before did not survive the first opportunity which came to Russia to denounce it. Hence a settlement whereby foreign warships are to be excluded from the Straits in general but under which nations at peace may send warships through

[22] *New York Times*, 21 December, 1922.

in strictly limited numbers for defensive purposes is proposed.[23] Even this solution would leave these waters at the mercy of Turkish and Russian fleets were it not provided that the naval force to be sent in by any non-littoral state might be equal to the naval strength on that sea of the leading Black Sea power, or to three ships of 10,000 tons each, at any time. Belligerent states not at war with Turkey are to have free passage for their warships, of course, without being subject to these limitations.[24]

Enforcement of any solution for the Straits which includes any extensive measure of freedom of use is a problem of some proportions in itself. The simplest step, that of relying upon the naked promises of the proposed agreement regarding the Straits, would be an ideal arrangement, if effective.[25] It is felt that such a step would be hazardous, however, in view of the only moderate level of national good faith and honor abroad in the world and the opportunities for disagreement concerning the purport of terms, the effect of alterations of circumstances, and other like factors. It would put the other signatories completely at the mercy of the state holding the fortifications, or being able to capture them by land, as the Gallipoli campaign in 1915 showed. Control of the shores of straits, of only one shore, even, gives a power over mercantile and naval use of the waters which can hardly be

[23] *Lausanne Conference*, 772–785, for Draft Straits Convention as agreed to by all states participating in the first session of the Lausanne Conference except Russia; Turkey has stated, at the second (adjourned) session of the Conference, that she does not desire to change the régime as drafted, and Russia is expected to sign also, in the end (*New York Times*, 26 April, 1923).

[24] *Lausanne Conference*, 774–776 (Draft Straits Convention, Art. 2, Annex, Par. 2, (a) and (b)).

[25] Suggested by the United States; *Lausanne Conference*, 146; also *New York Times*, 20 December, 1922.

overcome; the straits of Dover, Gibraltar, and Babel Mandeb—there happen to be several such geographical formations in the world—are in such position, and the Germans during the World War wanted Calais and Dunkirk thus to block Channel shipping and perhaps effect a crossing in spite of the British navy. Hence, a demolition of fortifications and a complete demilitarization of certain zones along the shores of the Straits is demanded.[26] But this, together with analogous prohibitions upon the laying of mines or otherwise endangering navigation in the Straits—if obeyed—would put Turkey at the mercy of the other signatories, if they chose to attack. Hence the plan for placing the Straits under the control of an international commission, presided over by a Turk, and supported by military force, but military force for the execution, and not for the defiance, of the agreement for free navigation of the Straits.[27] This commission is to operate under the auspices of the League of Nations, and Turkish acceptance for the general plan was secured in part by pledging this protection to Constantinople under the League.[28] If she desires to do so the United States may at any time take part in the activities of the commission.[29] Constantinople may be garrisoned by Turkey, but no Turkish troops may enter the demilitarized zones. Provisions against hostilities of all sorts in the Straits

[26] *Lausanne Conference*, 780–782 (Draft Convention, Arts. 6–9) and map at end of volume; also *New York Times*, 7 December, 1922, and *Current History*, Vol. XVII No. 4 (January, 1923).

[27] *Lausanne Conference*, 782–784 (Draft Convention, Arts. 10–16).

[28] *Lausanne Conference*, 784 (Draft Convention, Art. 18); also *Current History*, Vol. XVII, No. 2, 186 (November, 1922), and *New York Times*, 7 and 19 December, 1922.

[29] *Lausanne Conference*, 783 (Draft Convention, Art. 12); also *New York Times*, 6 December, 1922.

are included in the proposed settlement. The Turks are, apparently, prepared to accept this arrangement, in spite of the first views of their Russian friends. They have, however, haggled on detailed points for all possible advantages.[30] Time alone can tell how this particular effort to deal at Lausanne with this ancient problem in sea freedom succeeds.[30a]

A second great question which must be faced in a few years is that of the permanent régime to be established for German rivers opened to international navigation by the Treaty of Versailles, and, particularly, the possible internationalization of other European rivers to match that action.[31] In such an event the case of the Scheldt, the free use of which by Belgium is embarrassed by Dutch control of the mouth of the river, will demand attention.[32] The positions which various nations may be expected to adopt on this question have already been described.[33] It remains to be added that to open a German river and keep a French river closed, while it may serve to pay a just debt or inflict a just punishment, does not embody the ideal of freedom of navigation in its true form. Equality in the use of international waterways is the essence of sea freedom in time of peace. That object is not attained by such action as that taken in 1919. It should be noted that the Allied peoples are given rights of navigation on even such German rivers as are wholly within German territory, while Germans are not given even the right to use freely rivers of the true international

[30] Same, 23 December, 1922.

[30a] The Treaty of Peace and Straits Convention, as originally drafted, were finally signed at Lausanne on 24 July, 1923; *New York Times*, 25 July, 1923; text in *Treaty of Peace with Turkey*, 109–129.

[31] Treaty of Versailles, Arts. 321–364.

[32] Ogilvie, 243–248.

[33] Above, Chaps. 10–11.

form in allied countries.[34] Maritime equality and freedom is not served by such arrangements. But those arrangements may some day be made reciprocal, and unless the Allies intend to maintain for all time a servitude upon Germany or are willing freely to drop these privileges—neither of which is likely—this seems highly probable. In that case, some of the excesses of the Treaty of Versailles would serve the cause of the freedom of the seas very effectively.

Similar questions are bound to arise concerning the inland canals of Germany and neighboring European states subjected to similar treatment by the Treaties of 1919–1920, or capable of such treatment in a revision of the settlements of those years. This includes the Kiel Canal, internationalized as to use by the Treaty of Versailles.[35] And like the Kiel Canal the status of the international or interoceanic canals at Suez and Panama are certain to come in for reconsideration. Their open and free use to-day is chiefly the result of voluntary consent by Great Britain and the United States respectively. In spite of the Convention of Constantinople and the Hay-Pauncefote Treaty it is clear to all students of the problem—especially since the World War—that free navigation in those canals depends in actual fact upon the consent of those states which could at a moment's notice effectively stop the use of those gateways of world trade.[36] Should these artificial straits be treated as it is planned to treat the Dardanelles and Bosphorus, namely, by the demilitarization of their shores or the internationalization of their administration? But could British or American consent to such action be secured? Could Britain and

[34] Treaty of Versailles, Art. 327.
[35] Arts. 380–386.
[36] Hyde, § 198; Hall, § 39a.

American joint administration of both canals be secured? To ask such questions is to touch upon the most important present fact bearing upon future solutions of the problem of the freedom of the seas, the naval ratios of Great Britain, the United States, and other nations. Before dealing with that fact, we may turn briefly to the situation in the other great field of maritime law, the rules of war at sea, concluding with a notice of the way in which a solution of the problems in that field also turns upon the critical fact to which reference has just been made.

In discussing the future rules of the law of naval war, our hypothetical naval conference will face several major questions.[37] An attempt will have to be made to solve them all, or, at least, to reach some agreed conclusions on all disputed points. For that is the main thing to be desired just now, namely, agreed law, almost irrespective of just what ruling is made, in point of content, on the various questions open. Hence it is more in point to indicate here the fact that such a method of treatment by international legislation is what is needed than it is to try to indicate what solution should be given to each question. Of course, the solution reached on different points will make for greater or less maritime freedom, as the case may be. And the system of rules adopted must be consistent with itself, or fail of its purpose; many involved discussions of the details of the law of contraband, blockade, and capture are absolved from the charge of being empty exercises in legalistics[38] by the fact that so long as the ideas of "contraband" or "continuous voyage," or any others of the many concepts of naval law, are left elastic and indefinite, no restrictions on naval war imposed at other points will be effective.

[37] Above, Chap. 7.
[38] Baty; Meurer; Triepel; Piggott; Smith.

In the World War the belligerents by expanding those two categories and the category of "retaliation" circumvented all embarrassing restrictions in other parts of the law. But if the rules embodying those solutions meet general acceptance then even the restrictions on maritime activity become voluntary and hence no loss of ultimate liberty. And it would be impossible to indicate here even the writer's opinions regarding suitable solutions of those many moot questions. Accordingly, we shall merely indicate the questions to be dealt with and the main divergent paths which may be followed in their treatment, concluding with a notice of what may be the reasons for, or the results of, adopting one general type of treatment or another.

Shall the distinction between contraband and non-contraband goods be abandoned, in view of present military and social practice? The distinction between absolute and conditional contraband? Shall the attempt to devise a standard list of contraband goods be abandoned? Shall the states be left to adopt their own lists within the limits of accepted general principles governing the case? Are the old rules regarding destination in connection with conditional contraband to be rejected as inadequate, seeing that the development of railway transportation and national control of trade and transportation makes the point of importation relatively unimportant? Shall the mails and certain types of persons be treated in analogy to contraband and held subject to inspection and removal as such?

Shall the demand that a blockade be maintained by a cordon of ships on station off the blockaded port or coast be abandoned, in view of the danger of submarine attack? And shall distant and even indirect blockades be permitted? Shall mines and submarines be permitted in

setting a blockade? Shall the hidden danger of the latter be accepted as equivalent to the open threat of blockading cruisers in defining effectiveness?

Shall the doctrine of continuous voyage be admitted in connection with either contraband or blockade or both? Further, shall supplies entering neutral countries be controlled or rationed by belligerents to prevent reëxport to the enemy by land?

Shall belligerents be permitted to convey merchant ships to port for visit and search? Shall neutrals be denied the right to convoy their merchant vessels, and *a fortiori* to provide them with certificates regarding cargo and destination to obviate the delays incident to visit and search?

Shall naval powers be forbidden to convert merchant vessels into war vessels at sea or in foreign ports? Shall belligerent vessels be denied the right to transfer to neutral flags at all during or just preceding war?

Shall prizes be subject to destruction under special or general circumstances? And what is sufficient warning and protection for the personnel thereof—small boats in an open sea? Shall merchant vessels be denied the right to carry armament for defense without forfeiting the right to warning and safety for persons on board?

The mere statement of what is necessary in order to codify naval law serves to call up the difficulties involved and to indicate that it is impossible to remain upon the narrow basis of discussion just described. As soon as the proposal to codify international maritime law is made, the question whether such a result is at all possible of accomplishment is strictly in place. For if such a task is impossible we are thrown back upon the old method of treatment with all its difficulties. And if such a task is possible, what are the considerations to be taken into

account? What are the influences playing in upon the scene? Let us now turn to the problem freedom at sea in terms of national and international policy.

It may at once be admitted that the attempt to secure a generally accepted code of international maritime law is bound to encounter enormous obstacles. The states of the world vary to such an extent in geographical situation, historical maturity, economic and financial conditions, commercial interests, and existing naval power, that to obtain agreement among them on a whole code of maritime law will be exceedingly difficult. Conditions among the nations varying as they do, it is difficult to secure general consent to the most formal rules of international law, rules relating to such external matters as diplomatic procedure, for example. How much more difficult to secure agreement on matters touching, as does maritime law, so nearly upon the fundamental differences among the states.[39]

This line of speculation may be carried further, and one may deny that there can be a general question of the freedom of the seas at all, a question affecting all states, or even all maritime states, in anything like the same degree, or a question on which all states, or even all maritime states, are entitled to be heard. It may be said that we are not dealing with matters capable of being formulated in terms of abstract general legal or political principles, and of being treated as such. What we are dealing with is the needs, the interests, the actual sea power and naval policy of Great Britain! Not a question for the future, but a fact of the past and present, not a gen-

[39] See, for examples the divergence of views in the preliminary expressions of opinion of the Powers invited to the London Naval Conference on the proposed agenda for that Conference, in *Proceedings*, 57–119.

eral fact, but a British fact, not a problem for solution in general terms, but a current of national history to be recorded and recognized. When one questions and discusses sea power and sea freedom, does not one in those very ideas call in question Britain herself?

To this there are several replies. It is quite true that Britain is absolutely dependent on her sea communications for safety from invasion and starvation, as is no other state save, possibly, Japan; she, therefore, has a peculiar, a unique, a vital life-and-death interest in the sea.[40] But not an exclusive interest, for whether freedom at sea is a matter of general interest is a question of fact. It is a question to be answered not by saying that in one's opinion the states of the world at large should or should not take an interest in the matter and demand a hearing upon it. It is to be answered by inquiring whether they do in fact feel that they have interests deserving protection, and whether they do in practice insist and insist effectively on being heard. And the answer to this question is that the states in general do assert an interest in the matter and do obtain a substantial amount of attention for their views. Again, whether the question can be formulated in general terms—or, more important, whether the answer can be so formulated—depends upon whether general agreement among the nations can be secured, and this is a question only to be answered by trying. Finally, time is long, and there have been lords of the sea before this who spoke of their lordship as a fact, rather than as a question, or even as a temporary and special answer to a question, yet who have passed and their sea power with them. What are facts of law or legal right at present

[40] For an excellent brief summary of this aspect of the case see Laughton, J. K., "The Sovereignty of the Sea," in *The Fortnightly Review*, Vol. V, p. 718 (1 August, 1866).

depends upon what to-day receives the assent of the nations. And while the nations may assent, in their inability temporarily to dispute Athenian, Roman, Venetian, or British power, that does not mean that history is ended. Nor need it turn out that refusal to continue to assent to British domination at sea means the end of British history. The possibilities of the case are far more varied than pro-British—or anti-British—partisans appear to conceive.

Beyond these rather speculative questions and replies remains the very practical question whether the overturn of a given actual maritime domination is to be counted an unmixed blessing, or even desirable at any and every moment. In the absolute sense of complete liberty from legal or physical restraint, freedom at sea is never desirable; it is never demanded by civilized people. But is it even desirable always to insist upon destroying an existing monopoly of control by a given nation? It will be agreed that it is undesirable to permit such monopoly to continue as a general condition, and that states should —as a matter of national and international policy—take such military or naval and diplomatic and legal means as are necessary to prevent such a result. It ought also to be admitted, however, that it may be better to tolerate an existing, and therefore well-known, national maritime domination rather than to destroy it in such circumstances as to allow it to be replaced by the unknown domination of another state, more likely, perhaps, to abuse such power.[41] An autocratic military state would abuse power

[41] Compare the (important, and, in the main, true) claim that Britain has consistently used her sea power (against Philip II, Louis XIV, Napoleon and Wilhelm II, for example) for the protection of European national liberties; Hurd, in *Fortnightly Review*, Vol. CVIII, p. 685; Muir, *Mare Liberum;* Angell,

which a naturally liberal maritime state would not, perhaps. It has not been the great sea powers that have been most monopolistic and exclusive in the history of world commerce, but the great land powers. It may be undesirable to encourage the militaristic power which dragoons every citizen into the army life, in contrast to the maritime state whose navalism does not have this effect, even if the latter does lump enemy civilian and soldier together in its application of the blockade. Also it may be preferable to tolerate an existing lordship rather than to destroy it only to leave a condition of anarchy in its wake. All such choices involve a complicated weighing of circumstances and conveniences and principles and ideals at each historical crisis where the problem is raised.[42]

The questions regarding prize law just stated might be answered consistently in the negative, thus preserving, in the main, the doctrine relating to these matters prevailing before the World War and the doctrine supported by the continental powers or powers ordinarily neutral in naval war. This would be to revert to the attitude taken by the London Naval Conference and to a good many of its actual decisions. It would be a slight step further to carry on beyond that Conference to a still more drastic limitation of belligerent rights at sea, such as immunity for all private property except contraband of war, assuming that this exception would not nullify the principle itself—a risky assumption. Now it has already appeared that the code of 1909 would, if obeyed, have so severely limited naval power in the World War as to permit a

Chap. I. The national liberties of overseas peoples outside the continent of Europe, in Ireland, Egypt, South Africa, and India, are not mentioned.

[42] Above, Chap. II, at 196.

victory for dominant continental military power. To repeat the action of 1909 and attempt—it would probably be a vain attempt—to secure the readoption and the ratification of a code such as the Declaration of London would be to perpetuate or renew that situation. To increase the limitations upon belligerent action at sea would, of course, still further accentuate the difficulty. Still, by forceful pressure, armed coöperation, neutrals might compel naval belligerents to observe such rules; "armed neutrality" has been resorted to at one time or another in history—more or less ineffectively—to solve the neutral's problem of sea freedom.[43]

The result would be most unsalutary for Europe and the world at large. The power of attack of the great naval state, particularly Great Britain and the United States, would be largely destroyed. That of the great continental military state—France, Germany, or Russia—greatly enhanced. To bring their influence to play in the European scene—and upon the general world situation—the former powers would be compelled to create huge expeditionary forces and be ready always to fight on European soil. The great continental powers, drawing on the trade of the world for supplies, could fight on to conquest or mutual extermination unchecked. The small continental states would be placed at the mercy of the great military powers by the destruction of the weapons useful to the naval powers in rescuing them from such a fate. Naval warfare would be largely abolished, only strictly military actions to accomplish or prevent overseas expeditions, bombardments, and invasions being permitted. This would leave Great Britain and the United States safe from

[43] On armed neutrality in 1780 and 1800 (northern European States); and 1798 and 1917 (United States), see Moore, *Diplomacy*, 55–59, 94–96.

invasion by sea, as now, but it would add nothing in that direction while cutting down their offensive power, as already described. And with the danger of bombardment by aërial warfare developing as rapidly as it is, the safety from invasion by sea means less than it once did.

Yet the Declaration of London was a logical culmination of decades of reforming zeal directed at the restriction of the area of incidence of war. It was calculated to relieve non-combatants and neutrals still further from the effect of war between their nations. Is that objective to be surrendered or acknowledged to be unworthy of attainment?

The answer is extremely complicated. To begin with, it must be insisted that the humanitarian movement just described is and must be subordinated to considerations of reason and justice among the nations, including justice to maritime states depending on naval power. It is not reasonable to treat even non-combatants as though they were completely unrelated to their own belligerent nations. It is not reasonable to overlook entirely the effect of neutral trade on the fortunes of war. It is not just to handicap one state or type of state in war as against another state or type of state. Land warfare has been very severely regulated, it is true,—further, in some ways, than naval warfare,—but it still retains its effective power of disabling and bringing pressure to bear upon the enemy. And there is more reason for limiting military power; naval power is primarily defensive in character and the operations of a navy are adjudged by courts of civilian judges while those of an army are judged only by courts martial made up of army men themselves.[44] Naval warfare against commerce, moreover, would lose

[44] Woolsey, 154.

its effective power, apart from cutting off supplies for land warfare, if restricted as the extreme supporters of the freedom of the seas demand. It has been said that the fleet itself exists mainly for action against enemy commerce, that only by such action can it accomplish what armies accomplish on land, that without such power naval hostilities become meaningless "as a method of forcing the enemy to submit," [45] and that without such power "a naval victory can give nothing but security at home and the power of harrying the enemy's undefended coasts."

In the past it has been this feeling which has animated Great Britain in demanding a retention of full belligerent rights at sea against Dutch, French, American, and German protests in the name of freedom for private neutral commerce. And, Great Britain possessing a naval supremacy which enabled her to dictate the law of the sea to any opponent or combination of opponents, little headway in restricting belligerent rights was made until Great Britain, under the pressure of humanitarian considerations, the protests and threats of retaliation from neutrals, complaints from British shipping interests over the uncertainty of their (neutral) rights during the Russo-Japanese War, and other influences,[46] voluntarily began to surrender her more extreme demands (1856–1909). In that process of reform—demand and surrender—the United States was aligned with the continental non-naval powers.

At this point we must pass into the third aspect of the problem of the freedom of the seas: the problem in terms of power. Suspending for a moment our answer to the

[45] Corbett, 8.

[46] For view of the interplay of influences in British policy at 1909 see *Debates in the British Parliament, 1911–1912, on the Declaration of London*, entire.

question as to what is nationally and internationally desirable in rewriting the law of naval war, let us ask what America and the other states of the world could obtain from Britain if they cared to press her. In the past America and other states have been impotent against Great Britain because of lack of naval power. This was true even at the time of the London Naval Conference in 1909. To-day all that has changed. And the result is epochal in its proportions. Partly as a result of American naval development dating back to 1898,—a naval expansion animated to some extent by a deliberate intention to match British naval strength,—partly as a result of British naval losses and economies, there now exists, for the first time in over three centuries, a balance of power at sea. And Great Britain admitted this revolutionary fact by acceptance of the 5–5–3 ratio at the Washington Conference: an historic event of secular significance.[47] The failure of the Washington Conference to limit effectively the construction of minor naval craft, even if that failure is not repaired—as now seems more than possible—by supplementary action, can not nullify the effect of the agreement on capital ships and the many natural competitive forces making for a general naval balance to-day.[48] The avowed object of the agreement was to prevent competition in naval armaments. That object, of course, will not be attained if the nations go in for competitive build-

[47] Sullivan, Chap. II.

[48] *Current History*, Vol. XVII, No. 2, 244–248 (November, 1922), and *New York Times*, 21 December, 1922. No attempt has been made here to describe or analyse the concept of sea-power proper (capital and auxiliary ships, stations, cruising, command of the sea, local and general fleets, fleet in being, etc.); for all of this see: Angell, Chap. 4; Hannay; Hurd, *Command of the Sea;* Jane. For a view of the problem of naval bases and their relation to sea-power see Littlefield on the proposed British naval base at Singapore in *New York Times*, 12 August, 1923.

ing of destroyers and submarines. But even in that case the result of equilibrium or balance is almost certain to be attained—perhaps better, Japan and France considered, than if they do not. And the side of the balance over against Britain is now occupied by the United States.

Consequently, to take up again the questions of policy, if the United States saw fit to pursue the policy adopted in the past and press for immunity of private property at sea she might hope to have an influence which she lacked in other years. She could offer to surrender belligerent naval rights herself. She could threaten naval war unless her ship and cargoes were allowed to pass unmolested. She could use her naval power to enforce compliance with demands all characteristic of the continental state.

Britain might be expected to yield somewhat; if she yielded in 1909 she would yield further now, perhaps. She might even be expected to ratify a code so drawn—as she refused to do in 1911. But she would probably struggle to retain as many belligerent rights as possible. She would raise very sharply the questions of reason and justice just stated. And, on the other hand, she would point out, with telling effect, that a surrender of belligerent naval rights and a corresponding neglect of naval strength would cost Britain much but America little. Britain might go on to ask why, given our continental geography and the defensive value of our trans-oceanic situation, we feel that we need great naval strength or—turning to the other side of the case—how we propose to use it if we surrender belligerent rights at sea. Would not such an offer and demand on our part constitute an uncalculating survival of an older policy formed precisely when—and because—we lacked such strength? Would it not be better for America and Britain to join hands,

insist on preserving belligerent rights, and exercise them in concert to preserve peace and order in the world?[49]

In point of fact, American ardor for freedom at sea in time of naval war has begun to cool. We recall the utility of blockade and capture in 1861–1865. We recall the effective work of the navy in 1898. We pressed for limitation of maritime rights at The Hague in 1899 and 1907, at London in 1908–1909, and in the years 1914–1917, but our naval people have seen—and, on occasion, discreetly emphasized—the other side of the case.[50] And such of our naval and political leaders as think about such things at all know,—as Jefferson knew—that, short of expeditionary forces which are expensive things and not to be tolerated except in gravest emergencies, a "maritime force is the only one by which we can act on Europe." We are, therefore, likely to turn a more than half willing ear to such British suggestions that we accept a share of power in satisfaction of our aims, that we sanctify their power by sharing it, that we help rule the world.

A development of this character would nullify the effect of the naval situation created so slowly in the past quarter of a century. It would create an Anglo-American monopoly of world naval power very similar to the monopoly of land power in Europe held by the Allies in 1919. And by virtue of the smaller number of powers involved, the close sentimental and historic bonds between them, and their similar geographical situations and economic interests, such a combination might prove stable and lasting. In that case the freedom of the seas would be a lost cause

[49] Balfour, *The Freedom of the Seas;* "The Freedom of the Seas, A Conservative View," in *Living Age,* Vol. XII, 654 (14 December, 1918); "The Freedom of the Seas," in *London Times,* 17 December, 1918.

[50] Reeves; Rodgers; "The Freedom of the Seas," in London *Times,* 17 December, 1918.

for all but British and Americans and even their freedom at sea would not derive—as it should derive to be true freedom—from common and free international consent.

Things are not likely to go off in that direction, however. America is too firmly attached to the historic tradition of freedom at sea. There are too many obstacles to close Anglo-American coöperation in maritime domination. There are too many other national friendships and animosities to be borne in mind—such as the opposition of the Latin world with which we have so much to do. There are too many liberal, humanitarian, philanthropic, reformist groups in both countries to permit it—whether that be bad or good.

What, then, is the solution? Even if we have brought Britain to a point where she must admit a balance of naval power against her and consent to surrender her monopoly of maritime authority, what shall be done? To restrict belligerent rights as they were restricted in 1909, or even further, would be unfair, illogical, and bad policy for America herself. To frankly join Britain in a monopoly of sea authority is inadmissable. What then, is to be done,—particularly if the traditional purpose of restricting the losses and suffering caused by maritime war is still to be served?

Let us approach the problem afresh, dealing with the problems of policy and of power in one. The obstacle to freedom at sea—the reason for restrictions on absolute freedom and for domination by certain states in dictating the law of the sea—is the naval power and policy of the maritime state. That naval power was originally created in response to a need for security of maritime communications, to enable the maritime state to prevent invasion and send troops overseas; and it was expanded to give

the maritime state a power in war with the continental state which she does not possess in the form of large armies, for defense of her commerce and attack upon that of the enemy. This power she will not surrender so long as military power is left free to expand in continental states and to threaten her by invasion and commercial war through auxiliary naval power. The maritime state points out that it is permissible in land warfare for a belligerent to besiege cities and territories and prevent neutrals or others from sending supplies into besieged territories, that all trading with the enemy (not merely in contraband) may be and is prevented by the belligerent on land in areas open to his operations,[51] and that even if enemy private property may not be confiscated in war on land it may be controlled to prevent it from aiding the enemy and even taken for one's own use subject to ultimate compensation.[52] No one would demand free passage for neutral or enemy trains of freight in land war, nor free entrance by road, river, or canal into a besieged town on the land side; why freedom of trade by sea? The naval state claims that powers of blockade, contraband and capture, properly defined, are only maritime counterparts of these rights in land war and that, far from it being the case that land war is restricted more severely than naval war, as is often asserted, there are points where naval power is far more closely restricted than military power—as in respect to neutral trade—and that no limitation on military power is proposed remotely comparable with the proposed immunity of enemy private property at sea.

[51] For the significance of this phrase see the false case cited in Hays, at 289, in argument for immunity of private property in naval war.

[52] Corbett, 7.

How deal with this position to establish the freedom of the seas both justly and effectively?

German students of the question and German patriots and chauvinists in general attacked the problem most vigorously in the years 1898–1918,—more vigorously and more directly than French or American critics of British sea dominion ever have, and more comprehensively than any students of the problem since the seventeenth century Dutch. It will be convenient therefore to follow their attack at the beginning, diverging to some broader view of the question later.[53]

The simple German answer to British sea power was: destroy it in favor of a like German power. Freedom of the seas has always meant to many nations that freedom which could come only with mastery. So it was with Athens, with Rome, and with Britain, and in very recent days the American demand for a free sea has been associated with a demand for a navy second to none. In a strict logical sense this is sound; the subordinate is obviously not free, the equal is bound by agreements voluntary though they be, and only the master is completely free. At all events, German chauvinists of the Reventlow and Von Tirpitz school have held that Germany could obtain freedom at sea only by taking from Britain the scepter of the sea.[54] Demands for a navy competent to accomplish this task were the natural accompaniment of such a view. Demands for colonial markets, coaling stations and naval bases in different parts of the world, and the surrender of British holdings, put forward at the same time, suggested the same idea of sea freedom, for, while these demands were compatible with something short

[53] Hershey, "German Conception of the Freedom of the Seas," in *Am. Journ. Int. Law*, Vol. XIII, 207 (April, 1919).

[54] Hershey, 208–209.

of victory over Britain and domination of the seas, they betrayed at least a conception of sea freedom in terms of some degree of naval power.[55]

In contrast to this view of the problem is to be placed the older view of the German students of international law such as Niemeyer, Perels, and Triepel. These students have supported the ideal of freedom at sea under accepted law; the law to be revised and agreed upon from time to time much as was done in 1907 and 1909. They did not foresee much yielding by Britain, but they believed that gradually the desired results could be obtained by a process of negotiation.[56] The views of this group lacked force. They were negative in tone or at least neutral. And the members of the group either admitted a willingness to be satisfied with what could be obtained in negotiation by way of voluntary concessions from Britain, or, at any rate, they neglected to study the means of obtaining from Britain in negotiation more than mere gracious favors.

Other students, probing further, saw that, even if naval superiority over, and a defeat of, Great Britain were not necessary, naval equality and a power of bargaining with her at least were. In other words, a balance of power at sea.[57] This view was put forward very tentatively and obscurely in the early years of the World War, and it did not receive the amount of attention accorded to the

[55] Grand Admiral Von Tirpitz, quoted in *London Times*, 1 October, 1917; Wolsey, 152. As was said in the Preface, this constituted the principal cause of the Anglo-German or European War in 1914; this is now confirmed by Asquith's words in *Saturday Evening Post*, Vol. CXCVI No. 4, at 23 and 85 (28 July, 1923). On the story of that expansion itself see Asquith in same, No. 3, at 130–137 (21 July, 1923).

[56] Hershey, 215.

[57] Schulze-Gaevernitz; Stier-Somlo; Hershey, 215.

traditional view of the problem and to the more vociferous Reventlow theory. Hence it was not until the end of the war that this view had much influence in German thought.

By that time the scene had changed. With the defeat of the violent Reventlow policy, and the annihilation of German sea-power, not only was naval supremacy over Great Britain impossible but also naval equality with Great Britain. Hence instead of a discussion of freedom of the seas in terms of a balance of naval power we found German students putting forward a new idea, originally related to the balance of power theory, but now developed into something more sophisticated. And this marks at present the final stage of development of the theory of the problem of the freedom of the seas.

Herr Dernburg, former German Colonial Secretary, formed a link connecting the old ideas with the new. Having once argued for freedom at sea in the traditional sense and also for a balance of power at sea he now argued for an equilibrium of authority at sea in the form of an international police force.[58] This meant, of course, international federation, and the theory was soon put forward in those terms explicitly by Brockdorff-Rantzau, Ersberger, Schücking, and other leaders in the Germany of 1919. They demanded freedom on the seas except for restrictions imposed and enforced by a League of Nations for general international purposes.[59]

This position is, of course, suggestive of the position taken by President Wilson in his address to the Senate on 8 January, 1918.[60] It will be useful at this point, therefore, to turn to American thought on the subject in the years 1917–1919.

[58] Hershey, 210–211, 216, 217.
[59] Hershey, 211, 213.
[60] Above, 6.

Perhaps the best analysis of the problem in terms of a solution such as that suggested by President Wilson was made by a speaker before the American Academy of Political and Social Science in July of 1917. Said Mr. Frederick R. Coudert, a leading American international lawyer, strong partisan of the Allied cause, on that occasion: "The present rules of the sea in times of war are derivatives from the existing system of independent nations, each theoretically equal and subject to no higher law. I believe this system to be in gradual process of disappearance. Some great combination of the nations will take place, and provision will be made for declaring outlaw the nation violating the world's peace. In that event there will be a trusteeship of sea power and the enlightened nations of the world forming some combination will deal with the offending nation as the police deal with the burglar. No question of belligerent rights can then arise." [61] And again: "It may be said that it is not safe to leave the great sea power in the hands of one nation, even though history indicates that that nation on the whole has carried out its trusteeship well and in accordance with freedom and the betterment of mankind. Then indeed we must change the whole world system. Instead of nations being isolated units we will have to have a combination of nations." [62] A second speaker on the same occasion, Mr. Chandler P. Anderson, of experience and sympathies similar to those of Mr. Coudert, drew similar conclusions.[63]

[61] Coudert, 61; Mr. Coudert had in mind the United States, Great Britain, France, and—"possibly"—Russia.

[62] Coudert, 63–64.

[63] Anderson, 66; the idea of funding sea-control in an international league came forward in many places about this time: "The Freedom of the Seas," by L. F. Brown and F. G. Davenport, in *The Unpopular Review*, Vol. X, p. 79 (July–September, 1918);

From here, of course, the way lies open to connect the freedom of the seas with the limitation of naval armaments, or the stabilization at given levels, at levels somewhat near a balance, of such armaments. Wilson had said that the freedom of the seas was "a problem closely connected with the limitation of the naval armaments and the coöperation of the navies of the world in keeping the seas at once free and safe." [64] The treatment of the question through this method also serves to connect it up with the principle of the open door, free ports, most favored nation treatment, and freedom of commerce in general, all protected under the League.[65]

In all this there is one difficult step. That is the step of creating or obtaining a joint control of the sea. The problem of power, of ability to accomplish the desired end. Dernburg and the other Germans passed over this point rapidly. They hoped for British consent to a funding of sea-power in the League by grace of British idealism, in the zeal of the peace settlement. Of course, nothing of the sort happened. The British stood firm against even a discussion of the question of the freedom of the sea. And Germany could, of course, do nothing. Nor could America. The American naval program was not yet far enough along and American intentions in that direction were not formulated and declared clearly enough as yet. Wilson's efforts in that direction had been incomplete. Besides, he hesitated to force the issue in the existing state of opinion and in view of the delicate diplo-

Angell, *The World's Highway*, 1915; utterance of President Charles W. Eliot quoted in Hurd, *The British Fleet in the Great War*, 225; Vilallonga, 61.

[64] Address to Congress of 22 January, 1917.

[65] Dernburg, in *New York Times*, 2 July 1918; Lord Grey in *London Times*, 12 December, 1918; also *London Times*, 17 December, 1918.

matic situation. Finally, he believed that with the League in existence all would be solved for the League could define sea-rights in peace and war and authorize their enforcement and thus liquidate national maritime domination.

The solution was not, therefore, attained in 1919. The truth is that such a funding of sea-authority could be obtained only by the means effective to give states a voice in writing the detailed rules of sea-law in the past: a balance of power at sea. As Mr. Anderson put the case in 1917, "so long as sea-power is unequally distributed among the nations there is but little prospect of a settlement of this problem by international agreement." [66] The Germans were right. And America, driving her naval programs of 1916–1919 toward completion in the years 1920–1921, no longer counting on the League as a custodian and dispenser of sea-power and maritime authority, no longer hesitant to force the issue, has in the past year and a half been able to force a recognition of naval equality on the part of Great Britain and to achieve a position where the old problem can finally be dealt with effectively.[67]

Again, therefore, we return to the question of justice: how is America to use the balance she has obtained? To

[66] Anderson, 66; note the tenses.

[67] For sharp statements of American purposes in 1916, and of British view of this action by the United States see Bullard, in *Atlantic Monthly*, Vol. CXVIII, at 451, and Murray in same, at 732 (October and December, 1916); also Hurd, "The United States as a Sea Power: A Challenge," in *Fortnightly Review*, Vol. CXI, p. 175 (1 February, 1919). The balance here referred to is a balance of the war marine. At the same time the United States has been seeking a balance with Britain in the merchant marine. For possible effects of this see text, above, at 178 and 203.

compel Britain to surrender belligerent rights (ourselves giving them up also)? To join Britain in a monopoly of such authority? Both would be unjust and disastrous.

The answer lies in Anglo-American coöperation and general international organization for the suppression of international war entirely, and the substitution therefore of international government in a League of Nations. Nothing less can serve all the interests involved. Britain cannot be allowed to go on writing the law of naval war and exercising its rights, nor we join her in that tyranny; but she cannot be asked to surrender that right unless relieved of the threat of war. Only by such action can loss and suffering from naval war be restricted and eliminated without unduly hampering naval states in their competition with military states. A continuation of the attack upon war from the outside, from the flank, an attack upon its effects on commerce at sea, while permitting it to exist, is futile.[68] It must, in view of the very nature of the case, result in depriving the naval state of power while leaving the military state supreme, cutting down Anglo-American power in Europe and the world at large and enhancing French, German, and Russian power. Only by going to the roots of international war can it be effectively checked. Only by such a step can the maritime states be relieved of the danger of invasion and the necessity of maintaining navies for defense. Only so can they be relieved of the opportunity of using these navies offensively and of the necessity of doing so or creating costly overseas forces in order to compete in influence and power with continental military states.

In the past such a suggestion would have seemed not only unattainable but also disproportionate. It would

[68] Anderson, 66; Corbett, 11.

have appeared to be to suggest a remedy so difficult of attainment as not to be regarded as a legitimate or convincing alternative to the disease itself. Because it was felt that the suppression of international war was flatly impossible. War was felt to be a product of forces operating as naturally and inevitably as gravity and fire. No serious study was made of the technical problem of political engineering involved, because the situation was not viewed as such a problem. To-day we have at least come to see what is necessary if free international war is to be suppressed, namely, a definition and protection of national rights by international organization. Such a step entails a codification of international law, the adoption of mutual guarantees, and the provision of machinery for the adjudication of international disputes and the execution of decisions and of the guarantees already mentioned. America is, apparently, not willing to participate in such action yet. The attempt to undertake such an effort in the League of Nations, has not, moreover, become completely effective, apart from American participation: various European states remain to be included, and various steps remain to be taken to render its operation adequate to the needs of the situation. Hence the great powers—military as well as naval—are still unwilling to give up self-defense for mutual defense. The League of Nations is no substitute for the navy, the leaders of British policy declared at Paris in 1918–1919, nor for the army, as the French viewed matters. And only when the League is powerful enough to protect its members, or to nullify possible attack and invasion by engineering military and naval disarmament, will Britain relax her hold on naval power and naval rights. That step, and only that step, is calculated to solve permanently the problem of the freedom of the seas.

This might, moreover, be viewed as the best possible fate for British sea power, a sanctification more to be desired even than American participation alone. If Wilson's League should sanctify what Mahan had explained! The necessity of distasteful alliances with questionable continental powers would be gone. And the Anglo-Saxon navy would be the policeman of the seas by universal appointment.[69]

It should be noted that it is not proposed so much to abolish the powers of capture, blockade, contraband, and so on, entirely, but rather to transfer their exercise. What destroys international freedom at sea is national exercise of powers of restriction. To have such powers defined and employed by the League, as the League would need to do, as a method of enforcing its authority,—sea control would be the League's most effective weapon—would be an entirely different matter. Not so much neutralization of the high seas, as by the agreement of 1856 respecting the Black Sea, or the Anglo-American agreement regarding the Great Lakes, is proposed, but internationalization of authority thereon.[70]

Of course, even under these circumstances the problem of power, the factors of power, do not become unimportant. In such a situation America and Britain, dominant naval powers, would constitute the League for the time being; and Britain and America may well preserve their naval power and naval rights for such use, if the League is not to fall into the hands of the military states entirely. And it may well be said that, League or no League, as a sanction to sea power, perhaps more in the former case than in the latter, those nations only will enjoy freedom

[69] Angell, 158; Young, 5.
[70] Wicker, 2–3.

at sea which have sea power capable of competing on a footing with the leading powers, who must act for the League at sea. The position of America over against Great Britain cannot of certainty profit Denmark even within the League. In the last analysis only that state which has naval power can have naval freedom; supreme power or equal power. Only when a true international navy comes into existence, subject to general international control, can all states be sure to enjoy free seas, just as they can be sure of free passage in straits only when all shores of straits and fortified ports are demilitarized or internationalized. All this is true as of the existing situation. And the result for the weak neutrals would not appear to be very happy. For neutrality would then be in fact impossible, and not permissible in law. The League would need to require the participation of "neutrals" in preventing trade in contraband and breach of blockade, much as certain belligerents attempted to secure such assistance during the World War. The small neutral powers which now complain at the sea-tyranny of the naval giants would be free from that tyranny but subject to restriction by the League. Under such conditions even that measure of neutral freedom allowed by the naval powers might be lost.

But it would be lost in a manner and for an object repaying in ultimate liberty and protection all that was sacrificed for it.[71] Once exercised in the name or at the behest of the League, British and American power would begin to change. And the balance between Britain and America would be present to operate in restraint of these

[71] See the extraordinarily brilliant analysis of the problem of sea power in the League, written before the present American position had been attained, and suffering somewhat therefrom, in Brailsford, Chap. 7.

powers, which would be forced to act as the League dictated.[72]

In the movement just described, America, by the logic of history and the implication of her past policy and present naval power, should take the lead. Between 1916 and 1919 we did so. Party politics have temporarily interrupted that work. The Washington Conference was an action entirely in line with our fundamental position, interest, and probable future policy in this matter.[73] We shall resume that work and solve the problem of the freedom of the seas through international organization for the definition and protection of national rights, by international action, free international war being suppressed thereby. This, of course, is what Mr. Wilson had in mind when, in 1918, he demanded freedom of the seas except as the seas might be closed by the action of an international association for the enforcement of international rights. This is the explanation of the dropping of the question at Paris: in so far as a League of Nations is successful, it automatically would solve the problem of the freedom of the seas in time of war. Nothing else can.

So, finally, for the problem of the Straits, of international rivers, of Suez and Panama. For the definition and effective enforcement of adequate rules of international use for these bodies of water, for inducing riparian states to yield to such a settlement, and to afford them that protection without which they feel compelled to resist such internationalization of their territorial waters, only a general international league can be sufficient. For the

[72] Angell, 155.

[73] See the description of the action at Washington as a putting of naval power—our own as well as British—in commission in Sullivan, Chap. 7.

administration of such settlements when made only the bureaus of such a league can be effective.

In conclusion, let us sum up the whole problem in a paragraph. Freedom from all authority at sea, maritime anarchy, is impossible from a practical viewpoint, and undesirable. Freedom from having the law of the sea dictated by one power, as by Britain, can come only by matching the naval strength of that power. That not all states can do; equality of naval strength among all states is impossible. But it can be done, and has been done, by America, more or less vicariously for all. To serve the freedom of the seas best that situation must be utilized at least to secure, through international conference, a definition of the law of territorial waters and the law of war at sea, conciliating as reasonably and fairly as possible non-combatant and neutral freedom at sea in time of war with the belligerent aims of naval states, so long as international naval war is permitted, then, as a final step, our political, economic, and military or naval power must be used to secure such a definition and enforcement of national rights under a League of Nations as would make possible that suppression of international war, naval war included, without which full freedom of the seas is impossible.

APPENDIX A

NOTE ON THE "LIBELL OF ENGLISHE POLICYE"

Selden related, in the twenty-fifth chapter of his second book, how the English kings had, beginning in the time of Edward III (1327–1377), struck a certain coin, on one side of which was pictured a king, armed, sitting in a ship at sea, ornamented with a rose. This, according to Selden, was to "set forth a representation of the dominion of the English by sea." He continues,[1] "but as for the meaning of the impress . . . it is thus explained by a certain versifier, whose name is unknown, but he wrote in English rhyme in the time of Henry the Sixth, touching the conservation of the government of the sea." There follows a long quotation from a poem of which Selden says the manuscript lies in Sir Thomas Cotton's library.[2]

This poem was the *Libell of Englishe Policye* composed in 1435–1436 to counteract what the author considered to be disastrous tendencies in British naval policy. It does not prove that the sea dominion claimed was a recognized fact (although it asserts and implies it), and it does not even insist on the need for a legal *dominium maris* in the typical form, but it does indicate a fundamental policy of the foremost maritime state at this period, and, as it probably contributed to the determination of the national policy, it merits special attention on that score. It is more broadly interesting in its picture of the considerations for and against freedom of straits and freedom at sea in general.

The work is divided into a prologue, twelve chapters, and

[1] Selden, Bk. II, Chap. 25.

[2] For reference concerning the publication of the Libell see, below, Appendix B, IIIe.

an epilogue. In the beginning England is exhorted to "keep the sea environ and namely the narrow sea" for the sake of the "profit . . . and . . . worship and salvation to England" to be had in this way.[3]

The writer then defines his program as he proceeds. The true policy, it is said, is "to keep this regne (realm) in rest," . . . "south, north, east, and west," to "cherish marchanndyes, keep the amiraltee," "that we be maysters of the narrow sea."[4] Naval security is all that is here indicated. He refers to past naval power when the "see was kept."[5]

The possession of Dover and Calais would greatly facilitate this work, of course,[6] especially in controlling the passage of goods in time of war.[7] After a reference to the Rose-Noble it is set forth how the Flemish depend on British commodities for trade, and their need for a passage to the Spanish market is also an earnest of peace with any power that keeps, that is, holds, the channel.[8] The idea of Polybius regarding Byzantium is repeated here. Portugal is on the other end of the chain of trade and can be controlled in the same way, for Flanders is the staple for all nations.[9]

That the pirates of Brittany should be kept down is incidental; their liberty is due to the independence of St. Malo and St. Michel from the King of France.[10] Reverting to commercial competitors, Scotland is to be treated in the same way as Portugal and Flanders;[11] much space is devoted, here as in the previous cases, to a development of the complementary character of the demands and supplies

[3] Subtitle.
[4] Prologue, ll. 2, 5–7. The line citations refers to the Herzberg edition.
[5] Same, 5–14.
[6] Same, 21–22.
[7] Same, 25.
[8] Chap. 1, ll. 50–125.
[9] Chap. 2, ll. 125–149.
[10] Chap. 3, ll. 150–177.
[11] Chap. 4, ll. 246–275.

of the different countries. The conclusion of this portion of the discourse follows:

"Therefore if we would manly take on hand
To keep the sea from Flanders and from Spain
And from Scotland like as from petty Brittany
We should right soon have peace for all her boasts
For they must needs pass by our English coasts."

The trade which runs between Flanders and Prussia,[12] as that between Flanders and Genoa,[13] can be controlled in like manner and also all the Venetian and Florentine trade to northern Europe in articles of luxury and high profit. The Venetians may be prevented from abusing English merchants (by overselling them luxuries and draining gold out of the market) by keeping them out of this sea.[14] At the very least, the threat of a glut in the Flemish markets, with consequent falls in prices which would result from stopping the shipping in the Channel, would be a very effective weapon to keep all parties friendly.[15]

Referring to the policies of Edward III (1327–1377), and Henry V (1413–1422),[16] the writer turns to the methods necessary to accomplish his ends, and lets fall some phrases which come as near as he ever gets to the law of sea domain. Men are to be roused "to make this land have lordship of the sea"[17] and to "defend the land from every foe."[18] King Edward is termed the lord of the sea[19] after "the bataille of Sluce" (1340),—"lord of the sea was the king with victorie."[20] Henry V, if he had lived, "would

[12] Chap. 5, ll. 276–329.
[13] Chap. 6, ll. 330–343.
[14] Same, ll. 394–541.
[15] Same, ll. 541–585.
[16] Chap. 11, ll. 582 and following.
[17] Chap. 8, l. 617.
[18] Chap. 11, l. 949.
[19] Title to Chap. 11. § 2; also same, l. 1000.
[20] Same, ll. 1004–1009; see, above, text, Chap. 3, at 55.

have been lord and master about the round sea, and kept it sure to stop our enemies hence . . . that no passage should be without danger and his license, on sea to move and steer." [21]

Broadening his concept of the case the writer urges:

"Now then, for the love of Christ and of his joy,
Bring yet England out of trouble and annoy
Take heart and wit and set a governance
Set many wits without a variance
To one accord and unanimity
Put to good will for to keep the sea.
First for worship and profit also
And to rebuke each evil witted foe.
Thus shall riches and worship to us belong." [22]
"For many lands would seek their peace in need;
The sea well kept, it must be done for dread." [23]
"This unity is to God's pleasance
And peace after the war's variance." [24]
"Keep them the sea about in special
The which of England is the round wall
As though England were likened to a city
Of which the wall environ was the sea." [25]
"And thus should every land one with another,
Intercommon as brother with his brother,
And live together, warless, in unity
Without rancor in very charity
In rest and peace in Christ's great pleasure
Without strife, debate, and variance." [26]

[21] Chap. 11, ll. 1058–1063. The writer digresses here to urge a "keeping" of Wales and a subduing of "the wild Irish" for the safety of the realm.
[22] Chap. 12, ll. 1064–1072.
[23] Same ll. 1082–1083.
[24] Same, ll. 1088–1089.
[25] Same, ll. 1092–1095.
[26] Same, ll. 1100–1105.

One or two comments may, perhaps, be made upon this striking document. In no place is the writer treating a legal question of formal sea dominion but a politico-economic question to be served by naval supremacy in a certain limited portion of the sea. The term "lord of the sea" is used without any legal meaning. The author has in mind trade profit, defense of the realm, and political leadership (worship), a leadership which will enable Britain to serve, moreover, as the cornerstone of general international peace through the control of maritime communications. But this is chiefly because the author is not primarily a lawyer, and because he is interested in other things. It may be due also, perhaps, to the fact that in 1436 international questions were not yet commonly cast in legalistic form. At all events, in spite of the informal character of the claims made and the power sought, the Libell constitutes a very interesting and instructive exhibit of the motives and inclinations of a state seeking maritime dominion in the late mediæval or early modern period, and of the early tendency to identify national maritime supremacy and police supervision with the cause of general international authority.

APPENDIX B

BIBLIOGRAPHY

The materials listed below are grouped according to the order of treatment of the topics in the text. The headings of the various sections will indicate their contents. Works have been cited in the footnotes usually by the name of the author; a brief title has been added where necessary. Where special abbreviations have been used they are here indicated. Dates of composition or first publication are given in parentheses where later editions have been used and the date of composition is important. For explanations of references to bibliographical works (Kamptz, Ompteda, etc.), and of authors cited without specification of precise works see Appendix C, below, Notes on Documentation.

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APPENDIX C

NOTES ON DOCUMENTATION

§ 1.

The Greek and Latin writers cited in Chapters 1 and 2, above, are listed in Section II-b of the Bibliography (above, Appendix B). They are there listed under the familiar modernized forms of their names, and the works of these writers cited in the footnotes to Chapters 1 and 2 are also named in the most familiar form, English or Latin. The mode of citation is the conventional method of reference to chapters or sections of the texts as recognized in all standard editions. Wherever possible the Loeb editions were used.

§ 2.

Selden has put all modern students of the history of maritime jurisdiction deeply in his debt by his enormous collections of references to mediæval and ancient authorities on the subject. His references have been freely used in the composition of Chapters 1–3, above. Wherever possible his references have been verified. Where that has not been possible, or where there has seemed to be some doubt concerning the value of the reference even after it has been verified, reference is made to the text in Selden at the place where the citation appears.

The foregoing is particularly true of mediæval civilians and canonists, whose writings are not available to American students, even with the use of the library of the British

Museum and the Bibliothèque Nationale in Paris. In many cases, moreover, the writings of these scholars did not take the shape of distinct and unified compositions published under formal titles at a definite time and place. For all of these reasons the writers in Section III, b–d, of the Bibliography, are frequently named without specification of any precise work. Reference to Selden or to any bibliographical compendium will be needed to explain such citations, but no way of avoiding this has been discovered.

The references to Kaltenborn, Kamptz, Nys, Olivart, Ompteda, Rivier, and Fulton, in connection with works listed in Section II, b–d, are intended to facilitate such investigations and to indicate the source of the writer's information in such cases. These works are entered in this Bibliography not so much as works consulted as by way of indicating the literary history of the subject under examination. This whether the works have been discovered only on Selden's reference or independently, and whether they have been actually consulted or are known only through the bibliographers.

The notes regarding reprints are thought to be intelligible without further explanation.

The same may be said of certain of the works cited in Section IV, a–d, although many of these works were accessible to the writer in the magnificent Olivart collection at Harvard, or in the main collections at that University. In most cases the references to Kamptz, Ompteda, etc., are given nevertheless.

It is hoped that the arrangement of entries in Section IV, e–f, will reveal the way in which the controversy concerning the freedom of the seas lapsed after the end of the Napoleonic period, stirred slightly at the time of the Crimean War and the Declaration of Paris, relapsed into a quiescent state until the beginning of the present century, and then was reawakened and intensified by growing Anglo-German naval rivalry until the climax was reached during the World War. The presence of French and American

writers in—historically viewed, at least—peculiar rôles, will be noted; also the fact that the controversy of 1914–1918 did not exceed in magnitude or intensity that of the age of Grotius. For magazine literature of the recent controversy see the reference in Appendix B, above, section I e.

§ 3.

As was said at the beginning of Chapter 6, the statements of law in Chapters 6–8 should be supported by reference to official international documentary proof. That logically necessary method of documentation proves to be practically impossible. In Chapter 9 it was explained why the Hague Conventions and the Declaration of London could not be used for that purpose. Limits of space prevent proof by reference to the numerous treaties, arbitral decisions, and evidences of diplomatic or other international practice (military or naval) which might be invoked instead. Few text writers, addressing themselves specifically and wholly to the statement of the law, and not, as here, to such a statement only incidentally by way of illustration upon another theme, find it possible or convenient to pursue such a method. Too frequently texts of international law are compiled from other texts. Yet we are driven to that method ourselves for all the reasons mentioned here and in Chapter 9, above. Until we have an official international code of international law we can probably hope for nothing better. An attempt has been made to strengthen that method as much as possible by referring to five works of representative American, English, French, German, and Dutch jurists, together with the Resolutions of the Institute of International Law, formulated by the collaboration of jurists of all nations. Editions of the French, German, and Dutch writers dating from the pre-war period have been used, the text of the 1917 edition of Hall (English) is not different from that of pre-war editions, and it is believed that the scientific attitude of Hyde (American) will be

found to have been injured little by the influence of the events of 1914–1918. Finally, the references in these Chapters (6–8) are not made point by point, with the object of supporting each statement by authority; the statements made are made on the basis of the writer's own judgment, and the references are given chiefly to enable the student to seek illustration and comparative treatments by other writers.

§ 4.

The literature of maritime practice during the World War is, of course, very extensive, what with the diplomatic correspondence passing among belligerent and neutral states in the years 1914–1918, and the prize decisions of the war period. Again it would be impossible to introduce that material here. For this reason Garner's work on *International Law and the World War* has been drawn upon as fully as it has. The enormous labors of Professor Garner have provided us with an immense store of data drawn in large part from those primary sources from which alone such material should be drawn. If it be added that the student will detect and discount the influence of the mental atmosphere of the war period at certain points in Garner's work that will not be regarded as unduly severe. The diplomatic correspondence published by the Department of State in 1915–1916 (entered in Section VI, b–2 of Appendix B) may be most readily consulted by the American student desirous of referring to the original sources.

§ 5.

The references to the statistical materials in atlas and yearbook in Chapters 10–12 are intended to guide the reader to data concerning coast lines and continental areas, island possessions, wealth, population, area, resources, shipping, railroads, and military and naval forces on the basis

of which he may check up the writer's conclusions concerning the true maritime or continental character of the states used as illustrative of the theories advanced in Chapters 10 and 11. The illustrative examples are cited in those Chapters merely for making the theory put forward more comprehensible; the appropriateness of illustration is not decisive upon the validity of the theory, of course.

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